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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY,
APPELLANT,

vs.

ARIZONA STATE TAX COMMISSION, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

FILED MAY 28, 1964
PROBABLE JURISDICTION NOTED OCTOBER 12, 1964.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY,
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IN THE
SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

WARREN TRADING POST COMPANY, a corporation, Appellant,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

Abstract of Record on Appeal—Filed March 30, 1960

[fol. 4]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

No. 101942

WARREN TRADING POST COMPANY, a corporation, Plaintiff,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as Members of the Arizona State Tax Commission, and THE ARIZONA STATE TAX COMMISSION, Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT—
Filed August 26, 1958

First Cause of Action

Comes now the above-named plaintiff, and for its First Cause of Action against defendants, alleges as follows:

I

Plaintiff is a corporation, organized and existing under the laws of the State of Arizona.

II

The individual defendants are the duly elected, quali-
[fol. 5] fied and acting members of the Arizona State Tax Commission, among whose duties is the duty to enforce the Excise Revenue Acts of the State of Arizona. The defendant Commission is the Arizona State Tax Commission created by A. R. S. §42-101.

III

During all of the times mentioned in this complaint, plaintiff corporation was licensed by the United States Commissioner of Indian Affairs to conduct a trading post at Kayenta on the Navajo Indian Reservation in the County of Navajo, State of Arizona, on lands leased by plaintiff from the Navajo Indian Tribe.

IV

During all of said times mentioned in this complaint, plaintiff conducted a general merchandise business at said trading post, and a large portion of its sales were made to Reservation Indians whose homes were on said Navajo Reservation.

[fol. 6]

V

On February 25, 1958, defendant Arizona State Tax Commission made a corrected assessment against plaintiff, under the terms of which assessment plaintiff was and is obligated to pay a privilege sales tax to the State of Arizona upon sales made by plaintiff at its said trading post located on the Navajo Indian Reservation to Reservation Indians residing upon said Indian Reservation. That said corrected assessment, as appears from a copy thereof which is attached to and made a part of this complaint by reference as Exhibit "A", shows a Privilege sales tax levied against plaintiff for the period from November 1,

1956 to December 31, 195[illegible] in the sum of $2,886.49. That said tax was assessed against plaintiff under the provisions of A. R. S. §42-1312 and regulation .18.5 of defendant's Transaction and Use Tax Regulations.

VI

Defendant Arizona State Tax Commission, through its [fol. 7] representatives, has demanded of plaintiff the payment of said tax, and is now seeking to collect the same although plaintiff has repeatedly advised defendant that plaintiff is not liable for said tax and that defendant is without jurisdiction to impose the same upon plaintiff.

Wherefore, plaintiff prays judgment that the Court declare the rights of the parties hereto to be:

1. That defendant Arizona State Tax Commission has no jurisdiction or authority to impose upon plaintiff the privilege sales tax set forth in the corrected assessment described in and attached to plaintiff's complaint;

2. That the tax provided by A. R. S. §42-1312 does not apply to sales by a licensed Trader on an Indian Reservation to Reservation Indians residing on said Reservation;

3. That the tax imposed by the defendant Commission under A. R. S. §42-1312 upon plaintiff as set forth in [fol. 8] plaintiff's complaint constitutes an interference with the exclusive power of the Congress to regulate commerce with the Indian Tribes as provided in Section 8, Article I of the Constitution of the United States.

For such other and further relief as may appear to the Court to be just in the premises.

Snell & Wilmer, By Perry M. Ling, Attorneys for Plaintiff, 400 Security Building, Phoenix, Arizona.

Second Cause of Action

Comes now the above plaintiff, and for its Second Cause of Action alleges:

I

Realleges all of Paragraphs I, II, III, IV, V and VI of plaintiff's First Cause of Action as though the same were fully set forth herein.

II

On or about October 15, 1956, defendant Arizona State Tax Commission adopted consolidated transaction and use [fol. 9] tax regulations under the provisions of Chapter 9, Title 41, A. R. S., which regulations ever since have been and now are in full force and effect.

III

Among such regulations so adopted by said defendant was a regulation dealing with "Sales to the United States", numbered .18.5 which reads as follows:

"Trading Posts on Indian Reservations.

A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

IV

Persons affected by rules such as regulation .18.5 may seek a declaratory judgment with reference thereto under the provisions of A. R. S. §41-1007 which reads in part as follows:

[fol. 10] "§41-1007. Declaratory judgment and other remedies.

A. Any person who is or may be affected by a rule may obtain a judicial declaration of the validity of the

rule by filing an action for declaratory relief in the superior court of Maricopa County, in accordance with the provisions of article 2 of chapter 10, title 12."

V

Plaintiff is a person affected by the above rule in that plaintiff is a Trader duly licensed as such by the Commissioner of Indian Affairs and is conducting a trading post at Kayenta, on the Navajo Indian Reservation in Navajo County, Arizona, on land leased by plaintiff from the Navajo Indian Tribe. Defendant Commission has invoked said rule against plaintiff in making and levying the assessment against plaintiff set forth in Paragraph V of Plaintiff's First Cause of Action and adopted by reference as a part of this cause of action.

Wherefore, plaintiff prays judgment that the Court declare the rights of the parties hereto with reference to said Rule .18.5 to be that:

[fol. 11] 1. Defendant Arizona State Tax Commission is without jurisdiction or authority to impose upon plaintiff a privilege sales tax upon sales made by plaintiff to Reservation Indians at plaintiff's trading post on the Navajo Indian Reservation;

2. The tax imposed by said Rule constitutes an interference with the exclusive power of the Congress to regulate commerce with the Indian Tribes as provided by Section 8, Article I of the Constitution of the United States;

3. The tax imposed by said Rule constitutes an interference with the right of the Commissioner of Indian Affairs to fix the price at which commodities handled by a licensed Indian Trader should be sold;

For such other and further relief as to the Court may seem just in the premises.

Snell & Wilmer, By Perry M. Ling, Attorneys for Plaintiff, 400 Security Building, Phoenix, Arizona.

[fol. 12] Exhibit A, attached to the Complaint, is a photocopy of the Corrected Assessment made by the State Tax Commission covering sales by plaintiff to Reservation Indians from plaintiff's trading post on the Indian Reservation, which Corrected Assessment stated a balance due the Tax Commission in the sum of $2,886.49. This Corrected Assessment indicates the same was approved by the Tax Commission on February 25, 1958 and covers a period from November 1, 1956 to December 31, 1957. The Corrected Assessment also shows the total cash receipts of plaintiff, the total deductions and the balance claimed by the Tax Commission to be subject to the 2% sales tax.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

ANSWER—Filed September 5, 1958

Answer to First Cause of Action

Comes now the defendant, State Tax Commission of Arizona, and in answer to plaintiff's complaint, First Cause [fol. 13] of Action, states as follows:

I.

That it admits the allegations contained in Paragraphs I, II, III and IV of plaintiff's complaint.

II.

That it admits the allegations contained in Paragraph V of plaintiff's complaint except that the regulation in question is not properly cited and should be designated as regulation number 2.18.5 of the State Tax Commission's Transaction and Use Tax Regulations.

III.

That it admits that it has demanded of plaintiff the payment of the tax in question and is presently seeking to collect the same, but it denies that the plaintiff is not liable

for said tax or that the State Tax Commission of Arizona is without the jurisdiction or power to impose upon and collect the same from the plaintiff.

[fol. 14] Answer to Second Cause of Action

Comes now the defendant, State Tax Commission of Arizona, and in answer to plaintiff's complaint, Second Cause of Action, states as follows:

I.

That it admits the allegations contained in Paragraph I of plaintiff's complaint insofar as the plaintiff's Second Cause of Action adopts and realleges Paragraphs I, II, III, IV and V of plaintiff's complaint, First Cause of Action, except that it denies the allegations of that Paragraph insofar as it adopts and realleges Paragraph VI of the First Cause of Action of plaintiff's complaint. To that extent, the defendant State Tax Commission of Arizona herein incorporates by reference its entire answer as set forth above.

II.

That it admits the allegations contained in Paragraphs II and III of plaintiff's complaint except that it herein re-
[fol. 15] iterates that the regulation in question is properly cited as number 2.18.5.

III.

That it admits that the provisions of the Administrative Procedure Act, A.R.S. §41-1007, establish a proper remedy by Declaratory Judgment action for persons affected by certain rules adopted under the Administrative Procedure Act, but alleges that such statutory remedy does not and should not be construed to abolish the State Tax Commission's right to levy and collect taxes and demand payment under the protest payment provisions of the Excise Revenue Act, A.R.S. §42-1338 and 42-1339. It further alleges that it does not herein waive its rights to demand that the statutory procedure cited above be followed.

V.

That it admits the allegations contained in Paragraph V of plaintiff's complaint.

That by way of further and separate answer, the defen- [fol. 16] dant, State Tax Commission of Arizona, an administrative agency, alleges:

(a) That the tax assessed against and demanded from the plaintiff is assessed on the basis of retail sales within the State of Arizona by reason of its doing business in the State under the provisions of the Excise Revenue Act, a legislative expression of the taxing powers of the sovereign State of Arizona.

(b) That the tax imposed by the State Tax Commission of Arizona is a valid exercise of the sovereign taxing powers of the State of Arizona under the express provisions of A.R.S. § 42-1312 of the Excise Revenue Act.

(c) That the assessment is valid, lawful and constitutional.

(d) That the assessment is made under a regulation [fol. 17] promulgated by the Commission which is a valid, lawful and constitutional regulation and that said regulation does not constitute an interference with the exclusive power of Congress to regulate commerce with the Indian tribes, nor does it violate the Constitution of the United States.

(e) That the tax imposed by the State Tax Commission of Arizona does not constitute an interference with any rights of the U. S. Commissioner of Indian Affairs.

(f) That the tax imposed by the State Tax Commission of Arizona applies to sales by a licensed trader on an Indian Reservation to Indians residing on said reservation just as it applies to all other taxable retail sales within the State of Arizona and that the [fol. 18] plaintiff is not entitled to any tax exemption or deduction upon the sales in question.

(g) That both the imposition of the tax and the rules and regulations which form the basis for the tax are valid, lawful and constitutional exercises of the taxing and rule making powers of the State Tax Commission of Arizona, an administrative agency.

(h) That the plaintiff is not entitled to any deductions or exemptions under the levy and assessment in question and that the plaintiff has the burden of proving entitlement to any deduction or exemption, as well as the burden of showing that the tax in question is unlawful or inapplicable and that the plaintiff should be held to strict proof thereof.

[fol. 19] (i) That the State Tax Commission of Arizona, an administrative agency, does not waive any of its rights under the statutes of the State by submitting to the jurisdiction of this Court for a determination of this actual and justiciable controversy.

Wherefore, the defendant prays that the plaintiff take nothing by its complaint and that the same be dismissed and that the tax imposed by the State Tax Commission be upheld and declared valid, and that the rules and regulations upon which the tax is based be upheld and declared valid.

Respectfully submitted,

Robert Morrison, The Attorney General, By Robert G. Mooreman, Assistant Attorney General.

[fol. 20]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—
Filed March 5, 1959

Comes now the Warren Trading Post Company, a corporation, plaintiff herein, by its attorneys of record, and hereby moves the Court for a Summary Judgment in favor of the plaintiff and against the defendant.

This motion is based upon the pleadings and record in the file herein and upon the memorandum attached hereto.

Respectfully submitted,

Perry M. Ling, for Snell & Wilmer, Attorneys for Plaintiff, 400 Security Building, Phoenix, Arizona.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT—
Filed April 15, 1959

Come now the defendants, Thad M. Moore, Warren Peterson and W. E. Stanford, as members of the Arizona State Tax Commission, and The Arizona State Tax Com- [fol. 21] mission, by The Attorney General, and pursuant to Rules Civ. Proc., Rule 56, move the Court for a summary judgment in favor of the defendants, and each of them, and against the plaintiff, for the reason that the pleadings, stipulation as to facts, and record in this action disclose that there is no genuine issue between the parties as to any material fact, and that the defendants, and each of them, are entitled to a summary judgment against plaintiff as a matter of law.

Dated this 14th day of April, 1959.

Wade Church, The Attorney General, By Leslie C. Hardy, Chief Assistant Attorney General.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

SUMMARY JUDGMENT—October 7, 1959

The issues in this action are joined by the pleadings of [fol. 22] the respective parties; stipulation as to facts signed by counsel for the respective parties; the record; and motions for summary judgments made and filed by the plaintiff and defendants respectively.

The matter was presented to the Court on May 15, 1959 upon written briefs and oral arguments by counsel for the respective parties, Perry M. Ling, Esq., of the firm of Snell & Wilmer, appearing for plaintiff, and Leslie C. Hardy, Esq., Chief Assistant Attorney General, appearing on behalf of the Attorney General for the respective defendants; and the Court thereafter having had the motions for summary judgments under advisement, on September 9, 1959, filed a memorandum opinion which was accompanied by an order granting the defendants' motion for summary judgment and denying the plaintiff's motion for summary judgment.

It Is Now, Therefore, Ordered, Adjudged and Decreed, that the defendants, as constituting the members of the Arizona State Tax Commission, and the Arizona State Tax [fol. 23] Commission, have summary judgment against plaintiff for transaction privilege taxes assessed by the defendants against the plaintiff for sales of tangible personal property made by plaintiff, as a licensed Indian trader, to Reservation Indians, which sales were made by plaintiff at its Trading Post on the Navajo Indian Reservation within the State of Arizona, between the 1st day of November, 1956, to and including the 31st day of December, 1957, in the total amount of $2,886.49, together with interest thereon at the rate of ½ of 1% per month, or fraction of a month, from the date of this judgment until paid.

Given and dated this 7th day of October, 1959.

Yale McFate, Judge of the Superior Court.

Approved as to form this 1st day of October, 1959.

Snell & Wilmer; By: Perry M. Ling, Attorneys for Plaintiff.

[fol. 24]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—March 20, 1959

Hon. Henry S. Stevens, Judge.

Order setting Mar 5 Pltf's Motion for Summary Judgment (1) for Special Argument on March 27, 1959, at 10:00 o'clock A.M. in Div. 8.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—March 27, 1959

Hon. Yale McFate, Judge.

Mar 5 Pltf's Motion for Summary Judgment (2). Order vacating time set for special argument on motion for summary judgment herein, on stipulation of the parties, to be reinstated on stipulation.

[fol. 25]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—May 1, 1959

Hon. Henry S. Stevens, Judge.

Order setting Apr 15 Defts' Motion for Summary Judgment (1) for Special Argument, May 15, 1959, at 10:00 o'clock A.M. in Div. 8.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Motion Docket
Division No. 8

MINUTE ENTRY—May 15, 1959

Hon. Yale McFate, Judge.

Apr 15 Deft's Motion for Summary Judgment (2). Order taking motion for summary judgment under advisement.

[fol. 26]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Division No. 8
101942

[Title omitted]

MINUTE ENTRY—September 9, 1959

Yale McFate, Judge.

This matter has been under advisement.

Order granting defendants' motion for summary judgment herein.

Order denying plaintiff's motion for summary judgment herein.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Division No. 8
101942

[Title omitted]

MINUTE ENTRY—October 7, 1959

Yale McFate, Judge.

Order approving formal written Summary Judgment now presented to the Court, dated, signed and approved.

[fol. 27]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

Division No. 8
101942

[Title omitted]

MINUTE ENTRY—December 4, 1959

Yale McFate, Judge.

Order approving appeal bond of $5,772.98.
Order staying execution during pendency of appeal.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. 101942

[Title omitted]

NOTICE OF APPEAL—December 4, 1959

[fol. 28] To: Thad M. Moore, Warren Peterson and W. E. Stanford, as Members of the Arizona State Tax Commission; to the Arizona State Tax Commission, defendants in the above entitled action, and to the Honorable Wade Church and Leslie C. Hardy, Attorney General of the State of Arizona, and Chief Assistant Attorney General, respectively, Counsel for the above named defendants, and their attorneys of record:

Notice Is Hereby Given that the above named plaintiff, Warren Trading Post Company, a corporation, hereby appeals to the Supreme Court of the State of Arizona from the Judgment made and entered in the above entitled cause by the Superior Court of the State of Arizona in and for the County of Maricopa on the 7th day of October, 1959, and from the whole thereof, which Judgment denied plaintiff's Motion for Summary Judgment in the amount of

$2,886.49, plus interest at the rate of one-half of one per cent (½ of 1%) per month from October 7, 1959, until paid.

[fol. 29] Dated this 4th day of December, 1959.

Snell & Wilmer, By Edward Jacobson, Counsel for plaintiff, Warren Trading Post Company, a corporation, 400 Security Building, Phoenix, Arizona.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

APPEAL BOND—Approved December 4, 1959

Whereas, the above named plaintiff, Warren Trading Post Co., a corporation, has appealed to the Supreme Court of the State of Arizona from the judgment rendered in the above entitled court action in the above entitled court on October 7, 1959, in favor of the above named defendant, Thad M. Moore, Warren Peterson & W. E. Stanford as members of the Arizona State Tax Commission, and the Arizona State Tax Commission for Two Thousand Eight Hundred Eighty Six Dollars and 49/100th (2,886.49) and,

[fol. 30] Whereas plaintiff, Warren Trading Post Co., a corporation is desirous of suspending the execution of the judgment so appealed from.

Now, Therefore, in consideration of the premises and of such appeal, we, the undersigned, do hereby, jointly and severally, undertake and promise and do acknowledge ourselves, jointly and severally, bound unto said defendants in the sum of Five Thousand Seven Hundred Seventy Two Dollars and 98/100th (5,772.98) conditioned that said plaintiff, Warren Trading Post Co., a corporation will prosecute its appeal with effect and will satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and will satisfy in full such modification of the judgment and such cost, interest and damages as the Appellate Court may adjudge and award against it.

Dated this 3rd day of December, 1959.

Warren Trading Post Co., A member of the firm, By: Edward Jacobson of Snell & Wilmer, Counsel for Plaintiff, Warren Trading Post Co.

[fol. 31] Maryland Casualty Company, By: Durand R. Eaton, Attorney-in-Fact.

Approved this 4th day of December, 1959.

Yale McFate, Judge.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

DESIGNATION OF RECORD ON APPEAL—Filed December 10, 1959
(omitted in printing)

[fol. 33] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

WARREN TRADING POST COMPANY, a corporation, Appellant,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

EXCERPTS FROM APPELLANT'S OPENING BRIEF
—Filed July 29, 1960

* * * * * * *

[fol. 57] PROPOSITION OF LAW NO. 3

A STATE PRIVILEGE TAX ON A LICENSED INDIAN TRADER INTERFERES WITH THE SOLE POWER OF CONGRESS TO REGULATE COMMERCE WITH THE INDIAN TRIBES AND IS INVALID.

* * * * * * *

[fol. 62] We submit that sales of merchandise by a licensed Indian Trader to an Indian Tribe or to the individual Indians of that tribe on the Reservation constitute commerce with the Indian Tribes within the meaning of Article 1, Section 8, Clause 3 of the Constitution and that any state imposed tax for the privilege of carrying on such commerce is invalid.

* * * * * * *

[fol. 63] Respectfully submitted

Snell & Wilmer, Perry M. Ling, Attorneys for Appellant, 400 Security Building, Phoenix, Arizona.

[fol. 64] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

WARREN TRADING POST COMPANY, a corporation, Appellant,

vs.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

SUPPLEMENTAL ABSTRACT OF RECORD
—Filed September 8, 1960

[fol. 67]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

[Title omitted]

STIPULATION AS TO FACTS IN LOWER COURT
—September 1, 1960

It Is Hereby Stipulated by and between Perry L. Ling, of the firm of Snell & Wilmer, attorneys for the above

Appellant, and Leslie C. Hardy, Chief Assistant Attorney General, attorney for the Appellees, that the following statement of facts were the facts upon which the above case was submitted to the lower court:

1. The action sought a declaratory judgment with reference only to taxes on sales to Reservation Indians [fol. 68] who reside on an Indian Reservation where such sales were made by a licensed Trader at a Trading Post on an Indian Reservation.

2. That Congress has declared that permission to trade with Indians is subject to such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of Indians, and that Indian traders must secure a license to establish a trading post on an Indian Reservation; and that under the Act of Congress, the Commissioner of Indian Affairs has adopted regulations dealing with the licensing and conduct of traders on Indian Reservations.

3. All of the facts alleged in the Complaint which were all admitted by Appellees in their Answer, except (a) [fol. 69] the number used to designate a regulation adopted by the State Tax Commission, and (b) the allegation that Appellant was not liable for the tax and that the State Tax Commission was without the jurisdiction or power to impose and collect such tax.

4. That the question presented for decision was: May the State of Arizona levy and collect a tax upon the Appellant which is an Arizona corporation, licensed as an Indian Trader and conducting its business as an Indian Trader upon the Navajo Reservation, for the privilege of making sales of tangible personal property to Indians residing on the reservation.

Dated this 1st day of September, 1960.

[fol. 70] Snell & Wilmer, By Perry M. Ling, Attorneys for Appellant.

Wade Church, Attorney General, By Leslie C. Hardy, Chief Assistant Attorney General, Attorneys for Appellees.

The above statement of facts is approved as being the facts submitted to the Court and upon which the decision and judgment was based.

Yale McFate, Judge of the Superior Court.

[fol. 71]

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

No. 101942

WARREN TRADING POST COMPANY, a corporation, Plaintiff,

—vs.—

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Defendants.

MEMORANDUM OF OPINION—September 9, 1959

The parties have stipulated to the facts. The only question is, "May the State of Arizona levy a privilege sales tax upon a licensed Indian Trader with respect to sales made by him to Indians on the Navajo Indian Reservation?"

The Arizona Sales Tax does not impose a sales tax on the *purchaser* nor upon the *sale*, but instead, places the tax on the *seller*, for the privilege of engaging in business, and fixes the gross income from sales as the base for computing [fol. 72] the tax. Thus, the incidence of the tax is not on the Indian purchaser, nor on the sale made to him, but on the trader for the privilege of transacting business as a merchant..

The U. S. Supreme Court has held that a state may tax the property of non-Indians located on an Indian reservation on the theory that such taxation does not interfere with the exercise by the Federal Government of its constitutional and statutory authority. *Thomas* v. *Gay*, 169 U.S. 264. At least two state courts have held that a state may tax

the property of Indian traders, including their *stock in trade*. *Moore* v. *Beason*, 7 Wyo. 292; 51 Pac. 875; *Cosier* v. *McMillan*, 22 Mont. 484; 56 Pac. 965; *Noble* v. *Amaretti*, 11 Wyo. 230; 71 Pac. 879. In *Surplus Trading Co.* v. *Cook*, 281 U.S. 647, it was stated that Indian Reservations are a part of the state within which they lie, and the laws, civil and criminal, of such state, have the same force therein as [fol. 73] elsewhere within her limits, save that they can have only restricted application to *Indian wards*. Private property, within such a reservation is subject to taxation under the laws of the state.

It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned. A tax on the stock in trade is as much interference as a tax on the privilege of selling. Both are too remote to constitute interference with governmental functions.

Plaintiff makes an analogy between the Indian trader and such instrumentalities of the Federal Government as Post Exchanges, claiming the former is entitled to the same immunities from state taxation. There are, however, important distinctions:

(a) Government officers, under governmental regulations, handle and are responsible for all funds of Ex- [fol. 74] changes; whereas the Indian trader handles his own funds.

(b) Profits from operation of Post Exchanges, if any, do not go to individuals. They are used to improve the soldiers' mess and for other governmental purposes. The trader retains his profits.

(c) An Indian trader is not an officer of the government and his goods are his own private property, which he may sell indiscriminately to Indians or non-Indians.

(See *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, for discussion of nature of Post Exchanges.)

The Indian trader is not, in my opinion, an instrumentality of the Federal Government, but is rather a private busi-

ness entity licensed to carry on a mercantile pursuit on the reservation under rather strict governmental supervision. The court adopts the ratio decidendi set forth in *Cosier* v. *McMillan*, 22 Mont. 484; 56 Pac. 965 and *Noble* v. *Amaretti*, 11 Wyo. 230; 71 Pac. 879.

There will be an order granting the defendants' motion [fol. 75] for summary judgment, and denying the plaintiff's motion for summary judgment. This case has been difficult to decide and the court wishes to commend counsel for both sides in the splendid briefs submitted in support of their respective positions.

Dated This 9th Day of September, 1959.

Yale McFate, Judge.

[fol. 132] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

En Banc

No. 7026

WARREN TRADING POST COMPANY, a Corporation, Appellant,

v.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona State Tax Commission, and the ARIZONA STATE TAX COMMISSION, Appellees.

Appeal from the Superior Court of Maricopa County, The Honorable Yale McFate, Judge. Judgment Affirmed.

Snell & Wilmer, Perry M. Ling, of Phoenix, Attorneys for Appellant.

Wade Church, Former Attorney General, Robert W. Pickrell, The Attorney General, and Leslie C. Hardy, Former Chief Assistant Attorney General, all of Phoenix, Attorneys for Appellees.

Norman M. Littell, of Washington, D. C., Joseph F. McPherson and Spencer K. Johnston, of Window Rock, Arizona, Attorneys for The Navajo Tribe of Indians, as Amicus Curiae.

OPINION—Filed December 4, 1963

STRUCKMEYER, Justice:

[fol. 133] Appellant, Warren Trading Post Company, appeals from a judgment determining that certain taxes are due to the State of Arizona by reason of retail sales of personal property to reservation Indians residing on the Navajo Indian Reservation.[1]

The Arizona exaction arises out of the provisions of the Arizona Privilege Transaction Act, A. R. S. § 42-1308, requiring every person within Arizona[2] who receives gross proceeds of sale or gross income from sales to acquire a license for a fee of $1.00. A. R. S. § 42-1312 imposes a tax measured by an amount equal to 2% of the gross proceeds of sales or gross income on the privilege of selling any tangible personal property at retail.[3]

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[1] Appellant, a domestic corporation, licensed as an Indian trader by the Commissioner of Indian Affairs under Act of Congress, 22 Stat. 179, 25 U.S.C. §§ 261, 264, is authorized by Article III of its Articles of Incorporation to, among other things: (a) Buy, own, hold, sell, barter, pledge, hypothecate cattle and other livestock and in general to conduct and carry on a ranch and livestock business. (b) Deal in cattle and property. (c) Lend money. (d) Deal in shares of stock, bonds, promissory notes. (f) Buy, sell, hold and lease or construct reservoirs, canals, dams. (i) Carry on the business of purchasing, manufacturing, producing, selling, and dealing in goods and wares, merchandise and materials of every kind. (m) Maintain in addition to its principal office at Flagstaff, Arizona, one or more offices for the transactions of its business either within or without the State of Arizona.

[2] Indian reservations are within the political, governmental and geographical boundaries of Arizona. Enabling Act, § 20 (2); Draper v. United States, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107; Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456; Porter v. Hall, 34 Ariz. 308, 271 P. 411.

[3] The stipulation as to facts in the lower court specifically confined the question to taxes on sales to reservation Indians who reside on an Indian reservation. We assume that taxes arising

[fol. 134] In considering collectively the arguments presented, we observe certain conclusions which weigh heavily in the decision.

Tax immunity is never enjoyed as a matter of right but only as an incidental windfall when, and only as long as, imposition of the state tax impairs or interferes with the exercise of a federal function. Petition of S. R. A., Inc. v. State of Minnesota, 219 Minn. 493, 18 N. W. 2d 442, affirmed 327 U.S. 558, 90 L.Ed. 851, 66 S.Ct. 749. The immunity here claimed represents a severe impairment of the taxing power of Arizona. It is one we would not be disposed to sustain unless we entertained grave doubts but that a federal function was impaired.

We have repeatedly held that this tax is on the privilege or right to engage in business and is not a sales tax although generally referred to as such, that it neither imposes a tax on the purchaser nor upon sales but rather taxes the seller for the privilege of engaging in business, that the tax is the direct obligation of the retailer and not that of the consumer, and further that there is no statutory authority for the retailer to attempt to constitute himself an agent of the state for the purpose of receiving the tax and transmitting it to the state. The legal incidence of the tax falls upon the seller and not upon the buyer.[4] Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208; State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549.

[fol. 135] Were appellant an instrumentality of the United States Government by reason of its being licensed to do business with the Indians under the appropriate acts

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out of sales to others on the Navajo Reservation have been paid and therefore the right of the state to levy and collect such taxes is not questioned.

[4] The determination of the incidence of the tax by the state court is controlling, Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1, absent facts or construction upon which Federal Constitutional issues rest. Kern-Limerick v. Scurlock, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403.

of Congress,[5] no exemption is to be implied.[6] Alabama v. King & Boozer, 314 U.S. 1, 86 L.Ed. 3, 62 S.Ct. 43, 140 A.L.R. 615. Exemption of the person upon whom the legal incidence of the tax falls is not to be implied regardless of the fact that the burden is passed on so long as Congress has not expressly exempted such person, Esso Standard Oil Co. v. Evans, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800. We conclude that the Navajo Indian Tribe, Amicus Curiae, is not entitled to assert a greater immunity from non-discriminatory taxation for traders with whom its members deal than the United States for its employees, contractees or other chosen agents, even were we certain that the economic burden must inevitably be shifted to the Indians.[7]

[fol. 136] The Arizona exaction is non-discriminatory. It is not levied against Indians or Indian tribes as such but against all who engage in the business of selling within the geographical boundaries of the State of Arizona. The fact of legal title in the United States to the Indian lands is not sufficient to effect an exclusion of the state from excise taxes unless it appears that the state by consent or cession has transferred to the United States that residuum of juris-

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[5] The Navajo Tribe of Indians, Amicus Curiae, asserts that the Warren Trading Post Company is not a federal instrumentality.

[6] Appellant, as a licensee of the federal government, can scarcely claim a better position as an instrumentality by which the government accomplishes its purposes than an employee of the federal government, Graves v. New York, ex rel. O'Keefe, 306 U.S. 466, 83 L.Ed. 927, 59 S.Ct. 595; or a contractee, James v. Dravo Contracting Co., 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208. See Alvard v. Johnson, 282 U.S. 509, 75 L.Ed. 496, 51 S.Ct. 273, 75 A.L.R. 9.

[7] "* * * we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, 87 L.Ed. 1612, 63 S.Ct. 1284.

There is no suggestion arising out of the stipulated facts that the Indians are less able to pay this tax than other residents of Arizona of a like or similar economic status.

diction which otherwise it would be free to exercise.[8] Silas Mason Co. v. Tax Commission of Washington, 302 U.S. 186, 82 L.Ed. 187, 58 S.Ct. 233. The authority of the state may rightfully extend to all matters not interfering with the Indian's protection by the government. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246. The applicability of state law depends upon "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269, reversing Lee v. Williams, 83 Ariz. 241, 319 P.2d 998.

Historically three powers of the federal government have been used to support congressional action in legislating on Indian affairs. The War Making Power was invoked by the First Congress on August 7th, 1789, by entrusting Indian affairs to the War Department. 1 Stat. 49, 50. It was the practice and policy of the federal government during the many years of tension between Indian and non-Indian to negotiate with the tribes and to settle differences by treaty if [fol. 137] possible. See Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483. After the Civil War, it was recognized that assimilation not segregation of the Indians was necessary[9] and the use of the Treaty Making Power to deal with Indians as dependent alien nationalities was terminated by Congress in 1871. One of the last treaties was entered into with the Navajo Indians in 1868. Cohen, Federal Indian Law, 24, 210. For a more detailed background of the Navajo Tribe see Williams v. Lee, 358 U.S. 217, supra.[10]

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[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const., amend. X.

[9] See for further changes in the policy of Congress, Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2d 573, 82 S.Ct. 562.

[10] "There are many cases * * * recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations and treaties with them have been looked upon not as contracts but as public laws which could be abrogated at the will of the United States." Choate v. Trapp, 224 U.S. 665, 670, 671, 56 L.Ed. 941, 32 S.Ct. 565. Treaty rights would, of course, pre-empt those areas affected thereby and would require congressional sanctions before effective state action.

Neither appellant nor Amicus Curiae, the Navajo Indian Tribe, assert a tax immunity arising out of or supported by the terms of the Navajo Treaty with the United States.

In 1886 the Supreme Court of the United States examined a congressional enactment prescribing criminal laws for Indians living on reservations. In sustaining the plenary power of Congress to act in behalf of the Indians, the court said:

> "From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States v. Kagama, 118 U.S. 375, 384, 30 L.Ed. 228, 6 S.Ct. 1109.

Since then, the recognized relation of tribal Indians together with the commerce clause of the U. S. Const., art. 1, § 8 (3), granting to Congress the power "to regulate commerce with the Indian tribes" have been treated as the [fol. 138] sources of congressional power, see Williams v. Lee, 358 U.S. 217, supra; Perrin v. United States, 232 U.S. 478, 58 L.Ed. 691, 34 S.Ct. 387; Johnson v. Gearlds, 234 U.S. 422, 58 L.Ed. 1383, 34 S.Ct. 794, without always pointing specifically to either.

We do not doubt the plenary power of Congress to legislate in behalf of its wards by providing for them such federal services as education, health and reclamation, or that Congress may permit tribal self-government. The exercise of state jurisdiction may not impede the federal government in the treatment of its wards nor may it undermine the authority of the tribe in the exercise of self-government, Williams v. Lee, supra. Neither may it impair a right granted or reserved by federal law. Village of Kake v. Egan, supra. Otherwise state laws may be applied to Indians.

Congress has customarily carved out reservations from the unreserved public domain lying within the geographical boundaries of the state either to be owned or held by the Indian tribes. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, supra. State law consistent with congressional legisla-

tion in behalf of its wards and with the tribal self-government is not excluded on these reservations.

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United States or embarrass it in using the lands or interfere with its right of disposal.
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> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and [fol. 139] lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" Surplus Trading Co. v. Cook; 281 U.S. 647, 650, 651, 74 L.Ed. 1091, 50 S.Ct. 455.

Generally, it may be said that state laws apply to the extent they do not conflict with federal Indian laws.

> "Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony [or reservation], of such state laws as *conflict* with the federal enactment." United States v. McGowan, 302 U.S. 535, 539, 82 L.Ed. 410, 58 S.Ct. 286. (Emphasis supplied).[11]

We do not find that Arizona by taxing appellant interferes with the United States in the use of reservation lands for the purposes for which they were established or that its tax tends to thwart the purpose of the federal government in caring for its Indian wards and leading them into the habits and ways of civilized life.

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[11] See also New York ex rel. Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307; Draper v. United States, 164 U.S. 240, supra. Note too United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869.

This brings us to the ultimate proposition advanced by the Navajo Indian Tribe that the commerce clause of the federal constitution by its own force creates an area of trade free from interference by the state. There is here equated the power to regulate commerce among the several states with the Indian tribes in the argument that the states are not allowed "one single—tax—worth of direct interference with the free flow of commerce." But we do not understand that the commerce clause provides an automatic preemption to the federal government of every area wherein conceivably Congress might act.

[fol. 140] If there is an analogy to be drawn from the interstate commerce clause, still the possession of power in Congress does not exclude all state power. Southern Pac. Co. v. Arizona ex rel. Sullivan, 325 U.S. 761, 89 L.Ed. 1915, 65 S.Ct. 1515. A state may legislate freely upon those phases of commerce which are left unregulated by the nation and if the prohibition of state action is only inferable from the scope and purpose of the federal legislation, it must be clear that state action is inconsistent with the federal provisions. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 86 L.Ed. 754, 62 S.Ct. 491. Local authorities are not foreclosed from regulating matters of local concern merely because there may be some incidental but not burdensome effect on interstate commerce. Calif. v. Zook, 336 U.S. 725, 93 L.Ed. 1005, 69 S.Ct. 841; Cooley v. The Board of Wardens, 12 How. 299, 13 L.Ed. 996.

This brings us to the further assertion that the federal statutes on trading with Indians pre-empt the field of sales to Indians upon the Navajo Indian Reservation as against the Arizona Transaction Privilege Tax. By act of August 15, 1876, 25 U.S.C. § 261, Congress provided that:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

and by § 262:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the

fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may pre-
[fol. 141] scribe for the protection of said Indians."

It is argued that if appellant "proved his fitness to trade with the Indians to the satisfaction of the Commissioner of Indian Affairs and secured a license from the Commissioner, he would thereupon have the right, whether or not he applied for or received a Transaction Privilege Tax License from the defendants [members of the State Tax Commission], to set up as a trader on the Navajo Indian Reservation." But we do not think it follows because appellant is licensed by the Commissioner of Indian Affairs to engage in trade that he has also been commissioned to disregard state laws. Rather, we would think that the Commissioner of Indian Affairs in considering whether a trader is a "proper person" would consider whether he will or has complied with such state laws as are constitutionally consistent with the licensee's business.

By the Arizona Enabling Act, § 20, 36 Stat. 557, 568, the people of this state agreed with the United States to forever disclaim all right and title to all lands lying within Arizona's boundaries owned or held by any Indian or Indian tribes and that " * * * until the *title* of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Absolute jurisdiction does not mean invariably exclusive jurisdiction; the word "absolute" carries the meaning of undiminished not exclusive. Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2nd 573, 82 S.Ct. 562.

The same section of the enabling act further provides [fol. 142] that " * * * all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe." The taxation here forbidden is that of reservation lands. There is no general ceding of the taxation authority of the state. Congress has not provided non-taxability from excises although it could have.

> "If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, supra.

Moreover, any inference that this trader was intended by Congress to be relieved of the Arizona general non-discriminatory privilege transaction tax is to the contrary. By 61 Stat. 644, 4 U.S.C. §§ 105, 109, Congress authorized the states to extend sales taxes to persons residing on or carrying on their businesses and to transactions occurring in federal areas. While Congress specifically excluded Indians "not otherwise taxed," it did not purport to protect those who trade with Indians from taxation.[12]

We restate our basic conclusions.

First, assuming that appellant is an instrumentality of the United States government, no immunity from the tax will be implied.

Second, the test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws.

[fol. 143] Under the stipulated facts of this case we hold that the Arizona exaction as applied to the appellant does not thwart the will of Congress in its treatment of its Indian wards nor is it inconsistent with the power of Congress to regulate trade with the Indian tribes.

The judgment of the court below is affirmed.

Fred C. Struckmeyer, Jr., Justice.

Concurring: Charles C. Bernstein, Chief Justice; Jesse A. Udall, Vice Chief Justice; Renz L. Jennings, Justice.

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[12] We are not called upon to determine precisely the meaning of the language used by Congress. It is sufficient to say that Congress could have excluded appellant from the scope of the Arizona tax. But it did not.

[fol. 144] Lockwood, Justice (dissenting):

Chief Justice Waite has defined the judicial function in Minor v. Happersett, 21 Wall. 162 (1874) at 178:

> "Our province is to decide what the law is, not to declare what it should be . . . If the law is wrong, it ought to be changed; but the power for that is not with us."

In this case, I am convinced the majority of the Court misconceives what the law is in its concern over what the law in strict justice should be. The efforts of the federal government to protect the Indians may too long have held them as quasi-citizens living apart and lagging behind the rest of the nation in both privileges and proportionate responsibilities. Congress may have continued to hold too tightly its reins of control over commerce with tribal Indians. It may be that the system of favored "Indian traders" under license and control of the Commissioner of Indian Affairs is an anachronism in our modern economy. But it is not the function of this Court to change federal Indian policy. We should interpret, not amend the existing federal law and, on that basis, we should invalidate the tax in this case. In my opinion, Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians—an area of commerce delegated exclusively to the federal government in the Commerce Clause and a privilege granted solely by the Commissioner of Indian Affairs under 25 U.S.C. § 262.

[fol. 145] Before examining the relation between this privilege tax[1] and the Commerce Clause, the character of the

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[1] The following sections dealing with the transaction privilege tax are pertinent to this case. A.R.S. § 42-1308 provides in part: "A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the [Arizona state tax] commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license." * * * "F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days." [As amended, Laws 1956, Ch. 98, § 1.] Section 42-1309,

problem in this case needs to be more sharply focused. The majority treats this as an "exemption" case and, consequently, interprets strictly against the taxpayer. This is wrong. No exemption for an Indian trader exists in Arizona statutes; the appellant admits this. This case involves the *scope* of the Arizona privilege tax. While taxing power is inherent in the sovereign states, the states delegated certain taxing powers to the federal government in the Com- [fol. 146] merce Clause.[2] Therefore in this case, we must

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in part reads: "A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities . . ." And A.R.S. § 42-1312 reads as follows: "A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail . . ." Moreover, any person against whom this tax is levied may be enjoined from continuing in business until he has complied with the statute. A.R.S. § 42-1334.

[2] The states delegated to the federal government the exclusive power to tax the privilege of trading with Indians. Regarding another trade area included within the Commerce Clause, the United States Supreme Court stated in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) at 608: "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate Commerce when they gave Congress the power 'To regulate Commerce with foreign Nations, and among the several states, [and with the Indian Tribes].' U.S. Const. Art. 1, § 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress." Hence, the statement in the majority opinion that, by the language of the Enabling Act and the Arizona Constitution, Arizona ceded

determine whether the tax commission has trespassed upon an area of commerce delegated to the federal government.

Consequently, for the purpose of determining the scope of this tax, we should observe established rules of construction. First, when construing the ambit of a tax, as opposed to an exception to a tax, this Court has traditionally interpreted favorably to the taxpayer and strictly against the tax commission. Alvord v. State Tax Commission, 69 Ariz. 287, 213 P.2d 363 (1950). In addition, since 1935 when the Twelfth Legislature adopted this tax until 1956 when the tax commission issued Regulation 2.18.5 taxing Indian traders, the commission in administering the law had not construed the tax statute as including Indian traders. Although long administrative interpretation is not controlling, the courts give weight to such an interpretation when construing the law. Alvord v. State Tax Commission, [fol. 147] supra; Van Veen v. County of Graham, 13 Ariz. 167, 108 Pac. 252 (1910). And in cases concerning possible exercise of power by states over Indian affairs, the Supreme Court of the United States, on the basis of the Commerce Clause, appears to have raised a presumption against such state action. See, e.g., Williams v. Lee, 358 U.S. 217, 220-221 (1959); Kake Village v. Egan, 369 U.S. 60, 74-76 (1962); and Worcester v. Georgia, 6 Pet. 515, 561 (1832), Chief Justice Marshall's great decision which first announced this principle.

The all-important subject of this case is the relation between the Commerce Clause and the Arizona privilege tax. The Commerce Clause delegates to the federal government the power to control three trade areas: interstate, foreign, and Indian commerce. This congressional power over Indians has been described as a power as broad as that to regulate foreign commerce,[3] and broader than that to regu-

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only the power to tax reservation lands is misleading. This statement ignores the division of taxing power in the federal constitution.

[3] United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188 (1876), where the Supreme Court declared at 194: "Under the articles of confederation the United States had the power of regulating the trade and managing all affairs with the Indians

late interstate commerce.[4] Indeed, this federal power over [fol. 148] Indians may justifiably be characterized as plenary.[5]

Each trade area in the Commerce Clause may have been delegated to the federal government for a different reason. But a principle common to all three trade areas emerges from the Commerce Clause. A long line of "interstate commerce" and "foreign commerce" cases reveals a prohibition which applies equally to this "Indian commerce" case: A state cannot tax the privilege of engaging in an area of trade delegated exclusively to the federal government in the Commerce Clause.

Historically, a tax phrased in terms of a privilege for engaging in interstate commerce has been considered beyond

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not members of any of the States; provided that legislative right of a State within its own limits be not infringed or violated. [Article IX, Articles of Confederation.] Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—*a power as broad and as free from restrictions as that to regulate commerce with foreign nations.*" (Emphasis added.)

[4] See 1 Ops. Att'y Gen. 645 (1824); 1 Willoughby on the Constitution of the United States, 2d ed. § 226, p. 397; Story on the Constitution of the United States, § 1097; and, especially, Prentice and Egan, The Commerce Clause of the Federal Constitution, p. 342 (1898): "The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks. A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce."

[5] Worcester v. Georgia, supra; Willoughby, supra, pp. 379-402, 1327, 1328.

the power of the states.[6] *Any* such tax "burdens" interstate commerce. Alpha Portland Cement Co. v. Massachusetts, [fol. 149] 268 U.S. 203, 217 (1925). Two recent cases restating this position that the Commerce Clause completely protects interstate commerce from state privilege taxes are Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) and Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389 (1952). A state has no power to tax the privilege of doing interstate commerce because it is a privilege granted by the federal, not the state government.

The United States Supreme Court has not only forbidden a state privilege tax as a condition precedent to the beginning of an interstate business, but it also has denied the power of a state to impose a tax on the privilege of doing an exclusively interstate business after the business has begun. Such taxes have been struck down even though they were fairly measured according to the connections of a taxpayer with the taxing state. In *Spector Motor*, for example, the Supreme Court invalidated a Connecticut privilege tax imposed on an interstate trucking corporation and said at 609:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

See also, Alpha Portland Cement Co. v. Massachusetts, supra; Memphis Steam Laundry Cleaners, Inc. v. Stone, supra; Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

The United States Supreme Court has repeatedly invalidated a state tax phrased in terms of a privilege for [fol. 150] engaging in interstate commerce. This Court recognized this prohibition against such a tax in Combus-

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[6] The tax involved in the instant case has also been phrased in terms of a tax on the privilege of engaging in business. See A.R.S. § 42-1308 and Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955).

tion Engineering v. Arizona State Tax Commission, 91 Ariz. 253, 371 P.2d 879 (1962). The United States Supreme Court has also struck down state taxes on the privilege of doing foreign commerce. Brown v. Maryland, 12 Wheat. 419 (1827), for example, concerned a Maryland tax imposed on a foreign importer. The Court invalidated the tax on alternative grounds: the Import-Export Clause[7] and the Commerce Clause. Discussing the impact of the Commerce Clause on the state tax, the Court said at 447:

> "Congress has a right, not only to authorize importation, but to authorize the importer to sell . . . The power claimed by the State [of Maryland] is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

See also Crew Levick Company v. Pennsylvania, 245 U.S. 292 (1917).[8]

Although no court before this has ruled on the validity of a state tax which is imposed on the privilege of doing business with the Indians, the principle prohibiting such a tax on interstate and foreign commerce should also apply to this case. Certainly the Indian trader here is no less favored by the Commerce Clause than is the interstate trucker in *Spector Motor* and the foreign importer in [fol. 151] *Brown*. From the Commerce Clause emerges a principle forbidding a state tax on the privilege of engaging in an area of trade delegated exclusively to the federal government. Consequently, in my opinion, this privilege tax is invalid when imposed on a federal Indian trader. Arizona has no power to tax the privilege of doing business with the Indians because it is a privilege granted solely by the federal government.

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[7] U.S. Constitution, Article 1, § 10, Clause 2.

[8] Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 75 (1946), cites *Brown* and *Crew Levick* with approval, although the *Richfield* decision was based on the Import-Export Clause.

Indeed, this prohibition arising from the Commerce Clause applies with greater force in the area of Indian commerce than in the other two trade areas. First, as opposed to interstate and foreign commerce, doing business with the Indians is a privilege conditionally granted by the federal government, not an individual right. While any person may engage in interstate and foreign commerce in the absence of regulations to the contrary, no one may sell to Indians unless licensed and rigorously regulated by the Commissioner of Indian Affairs.

Secondly, we have here a stronger case against a state privilege tax than in the case of foreign or interstate commerce because Congress has more fully occupied and regulated the area of Indian commerce. The federal government, for example, neither grants nor regulates the privilege of engaging in interstate commerce in the manner it grants and regulates the privilege of engaging in Indian commerce. Under the present law, the Commissioner of Indian Affairs has the exclusive power to regulate the kind, quality and price of the goods sold to the Indians. [fol. 152] 25 U.S.C.A. §§ 261-264.[9] Implied prohibitions

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[9] § 261 *"Power to appoint traders with Indians.* The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.

§ 262 *"Persons permitted to trade with Indians.* Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.

§ 263 *"Prohibition of trade by President.* The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any

from the Commerce Clause set certain minimum conditions for engaging in interstate and foreign commerce. For Indian commerce, however, we have not only the implied prohibitions from the Commerce Clause, but a complete set of federal regulations which does everything except expressly prohibit this tax.[10]

[fol. 153] Even so, the majority in this case, cites language from Oklahoma Tax Commission v. United States, 319 U.S. 598, 607 (1943), an estate tax case, and concludes: "Congress has not provided non-taxability [of Indian traders] from excises although it could have." As we have seen, the majority persists in treating this as an "exemption" case and in construing strictly against the taxpayer. Consequently, to support its position, the majority uses language from *Oklahoma Tax Commission,*[11] an "exemption"

Indians of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264 "*Trading without license; white persons as clerks.* Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500 . . ."

[10] The set of federal regulations regarding the operation of radio stations also does everything except expressly prohibit such a state tax. In Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U.S. 650 (1936), Justice Stone, writing for an unanimous court, invalidated a state occupation tax measured by gross receipts (which is really only another name for a privilege tax) when imposed upon a radio station operating under a federal license. One of the controlling facts was the requirement of the federal license. The act involved in the case, the predecessor of the Federal Communications Act, prohibited "any save licensees to operate broadcasting apparatus." The resemblance of this act to the federal regulation in the instant case, § 261, is apparent.

[11] The majority quotes twice from *Oklahoma Tax Commission:* While some language from that case may superficially appear applicable, it actually has no relevance to the instant case. Not only is *Oklahoma Tax Commission* an "exemption" case, but Oklahoma Indians are anomalous. The United States Supreme

case. But this is a "scope" case; it concerns the ambit of the Arizona tax in relation to the powers delegated to the federal government in the Commerce Clause. Therefore, this Court should interpret favorably to the taxpayer. Alvord v. State Tax Commission, supra.

Moreover, the absence of express Congressional prohibition of this tax should not be interpreted as implied consent. At the time the federal regulations were passed, such a tax had never been proposed. In addition, where the power is exclusive, as it is here, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction. Robbins v. Taxing [fol. 154] District of Shelby County, 120 U.S. 489 (1886); Philadelphia & S. Mail Steamship Co. v. Pennsylvania, 122 U.S. 326 (1886); Leisy v. Hardin, 135 U.S. 100 (1889); and In re Rahrer, 140 U.S. 545 (1891). Consequently, the Commerce Clause precludes this tax on appellant, even in the absence of a specific prohibition by Congress.

The majority restates its two basic conclusions at the close of its opinion. The first conclusion regarding no tax exemption for a federal instrumentality is immaterial; appellant specifically abandoned this "instrumentality" theory during oral argument. The second conclusion has two premises: first, this tax imposed by Arizona is not "inconsistent" and, second, it is not "burdensome" to federal purposes or laws. I will analyze these premises in inverse order.

When determining that this tax does not have a "burdensome effect" on Indian commerce, the majority uses the "local activity" test from California v. Zook, 336 U.S. 725

Court recognized this in *Oklahoma Tax Commission* at 604. See also Cohen, Federal Indian Law (1956) 1051. Consequently, a case involving Oklahoma Indians does not necessarily apply to this case involving Navajo Indians. The relation between the Navajo Indians and Arizona differs significantly from the relation between the Oklahoma Indians and Oklahoma. See also Williams v. Lee, supra, at 222-223. Arizona has assumed fewer responsibilities than Oklahoma and the Navajo Indians have exercised a greater degree of tribal autonomy than the Oklahoma Indians.

(1949) and Cooley v. The Board of Wardens, 12 How. 299 (1851). This reasoning suffers from what might be termed a "transplanted category." [12] This is what Walter Wheeler Cook warned against when he wrote:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against." [13]

[fol. 155] A test developed for the purpose of protecting the free flow of interstate commerce does not necessarily accomplish the purpose of protecting Indian commerce. The "local activity" test of *Zook* and *Cooley* has relevance when applied to an interstate commerce problem; Congress wanted to protect the free flow of trade between states, but did not intend to regulate local activities. But this "local activity" test has no relevance when applied to this Indian commerce problem. Formerly, Indians were considered "the wards of the nation." United States v. Thomas, 151 U.S. 577 (1894). Recent decisions have described the role of the federal government in relation to Indians as a protective trusteeship. See, e.g., United States v. McGowan, 302 U.S. 535 (1938). Congress, therefore, has the duty of regulating commerce with the Indians, even if this commerce appears to be a "local activity" because it takes place wholly within the boundaries of Arizona. Consequently, it is fallacious to reason that this tax does not constitute a burden on Indian commerce just because it is measured by a "local activity." [14] So much for the majority's "burdensome" reasoning.

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[12] For an enlightening discussion of this fallacy, see Hancock, "Fallacy of the Transplanted Category," 37 Can. Bar Rev. 535 (1959).

[13] Cook, Logical and Legal Bases of the Conflict of Laws (1942), p. 159 quoted in Hancock, *op. cit.*, p. 575.

[14] For the same reasons, we would fallaciously transplant another category if we applied to the instant case the "intrastate transaction" test of International Harvester Co. v. Department of the Treasury of Indiana, 322 U.S. 340 (1944).

And when determining that this tax is not "inconsistent" with federal purposes, the majority gives us an interesting history of federal powers and then concludes, without further explanation, that this tax does not conflict with federal [fol. 156] laws. But the Department of the Interior, in a formal opinion by the First Assistant Solicitor, could not have been more clear and more definite in this regard:

> "Question has arisen as to how far Indians and persons trading with Indians are subject to the sales taxes imposed by Arizona law. Since the problem is a general one and the Arizona statutes in question are not dissimilar in substance from the sales tax laws of other States and since the subject has been previously covered only in informal memoranda, I have determined to treat the question in a formal opinion.
>
> * * *
>
> "The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians.
>
> * * *
>
> "Where Congress has exercised its authority it is axiomatic that the field is closed to State action, Sperry Oil and Gas Co. v. Chisholm, 264 U.S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions.
>
> * * *
>
> "Traders on Indian reservations who are non-Indians are, in my opinion, required to take out licenses under Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their

> transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians.
>
> • • •
>
> [fol. 157] "The preceding part of this opinion demonstrates that sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is added to the price of the article to cover the tax. Such additions to the price of articles by State action are clearly interferences with the authority of the Commissioner of Indian Affairs to regulate the prices at which goods shall be sold to the Indians." 57 Interior Dept. Decisions 124 (May 8, 1940).[15]

An "interference with the authority of the Commissioner of Indian Affairs" is inconsistent with federal purposes and laws. Despite this unequivocal language, the majority opinion audaciously advises the Commissioner of Indian Affairs, when determining whether a trader is a "proper person", to "consider whether he will or has complied with" the imposition of the tax in question. So much for the majority's "inconsistent" reasoning.

The majority opinion refers to 61 Stat. 641, §§ 105 and 109 (commonly referred to as the "Buck Act") as a specific congressional authorization to the states to extend sales taxes to persons residing in or carrying on their business and to transactions occurring in "federal areas." Section 110(e) of the Buck Act defines "federal area":

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States [fol. 158] or any department, establishment, or agency, of the United States; . . ."

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[15] The Arizona statutes permit a seller to "add" the tax to the sale price separately, or to "absorb" it in the specified sale price. Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955). It would obviously be specious reasoning to say that a seller in "absorbing" the tax fails to make his price cover the amount of the tax. In either event, it is ultimately passed on to the purchaser.

This definition does not include Indian reservations. An Indian reservation is land held by the United States for Indian use, not for use by the United States. See Your Food Stores, Inc. v. Village of Espanola, 361 P.2d 950 (N.M. 1961). All the Buck Act purports to do is subject to state taxation persons previously not taxed because the transaction "occurred in whole or in part within a federal area."[16] The basis for not taxing an Indian trader is not the physical location of the trading post, but the fact that such a trader conducts "commerce with the Indian Tribes" within the language and purpose of the Commerce Clause. If the legislation regulating Indian traders was based upon the power of Congress to control entry and operations on the area where the trading post is located, then perhaps the Buck Act might be construed to give congressional consent to state taxation. But state taxation in the instant case conflicts with federal policy based on Commerce Clause regulation, rather than on proprietary or jurisdictional regulation. See 58 Interior Dept. Decisions 562 (December 24, 1943).

[fol. 159] The thesis of the majority opinion, reduced to its simplest elements, is: The Arizona tax in question is imposed on all persons within the territorial boundaries of the state for the privilege of engaging in the business of selling at retail. The state has imposed the tax on the seller, and it is not concerned with his manner of sale or choice of buyers. He is not required to collect the tax from the buyer. He may do so by collecting it in addition to the specified selling price, or he may "absorb" it in the price to the purchaser.[17] The state has no interest in the

[16] See, e.g. Bowers v. Oklahoma Tax Commission, 51 F. Supp. 652 (D.C. Okla. 1943) (contractors on Fort Sill Military Reservation); Hill v. Joseph, 129 N.Y.S.2d 348 (1954) (concessionaries on Bedloe's Island); Kiker v. City of Philadelphia, 31 A.2d 289, cert. denied 320 U.S. 741 (1943) (employees of League Island Navy Yard); Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) (employees of naval ordinance plant); City of Springfield v. Kenney, 104 N.E.2d 65 (Ohio App. 1951) (residents of federal housing project):

[17] Arizona State Tax Commission v. Garrett Corp., supra.

source which the seller uses in remitting the tax, although it is calculated on the selling price. Therefore if the seller chooses to sell to Indians on a reservation, this neither relates to the imposition of the tax on the trader, nor does it interfere with or violate any federal constitutional or statutory provision.

Since the trader in this case is a business corporation, not a charitable or philanthropic organization, it would be unrealistic to suppose that the trader would abandon the general business practice of passing a tax on to the consumers in some form. The factor which the majority opinion overlooks or ignores is that in doing so, the trader must adjust his selling prices. In turn, this adjustment of selling prices becomes a factor *created by state fiat* which the Commissioner of Indian Affairs and the trader must take into consideration in determining the prices at which a trader must sell merchandise to reservation Indians. This [fol. 160] applies to traders already licensed by the Commissioner, as well as to those making application for the privilege in the future.

The majority maintains this situation does not create an interference with the regulation of commerce with the Indian tribes. I maintain that it does.

Lorna E. Lockwood, Justice.

[fol. 161]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

[Title omitted]

EXCERPT FROM APPELLANT'S MOTION FOR REHEARING—
Filed December 19, 1963

* * * * * * *

[fol. 162] 3. Assuming, arguendo, that the Court used the proper legal test, it appears that the Court's opinion is based, in part, upon incorrect factual assumptions:

A. The Court assumed that the privilege tax is not inconsistent with or burdensome upon federal laws and purposes, yet:

1. It is inconsistent with the federal purpose of permitting reservation self-government as it conflicts with a privilege tax on traders imposed by the Papago tribe, and

* * * * * * *

[fol. 163] Respectfully submitted,

Snell & Wilmer, By: Edward Jacobson, Attorneys for Appellant.

[fol. 165]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

EXCERPT FROM APPELLANT'S MEMORANDUM SUPPORTING MOTION FOR REHEARING—Filed December 19, 1963

* * * * * * *

[fol. 174] III. *Invalid Factual Assumptions:*

As stated hereinabove, we feel the Court may have overlooked the character of tax involved in this case, and thus applied an improper test for determining the constitutionality of the tax.

However, even assuming arguendo that the Court was correct in using the "undue burden" test (instead of the no-burden rule) when considering a privilege tax on one [fol. 175] of the activities in the Commerce Clause of the Constitution, we believe the Court in reaching its decision made certain inaccurate factual assumptions, which, if corrected, would cause the Court by its own reasoning in the majority opinion to reverse its position.

A. *The Court assumed as a factual matter that the state privilege tax was not inconsistent with or burdensome upon federal laws and purposes.*

In concluding its opinion, the Court summarized its primary reason for the decision as follows:

"[T]he test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws."

In reaching this conclusion, we suspect that the Court may have overlooked the following:

1. One of the Arizona Indian tribes (the Papagos) recently has enacted its privilege transaction tax on traders making reservation sales. Before passage of the law by the tribe, it had to be, and was, approved by the United States Department of the Interior.

   In the words of the United States Supreme Court in *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 70 L.Ed. 2d 573, 82 S.Ct. 562, 569:

   > "... the test of whether a state law could be applied on Indian reservations ... was whether the application of that law would interfere with reservation self government."

   We submit that the imposition of Arizona's Transaction Privilege Tax interferes generally with the [fol.176] Federal purposes of permitting reservation self-government and interferes specifically with the ability of the Papagos (and any other tribe that may hereafter so desire) levying a 3% tax on the privilege of Indian traders making sales on the reservation. The interference and conflict consists of dual sovereignties imposing an identical regulatory privilege tax at even the same rate and for the privilege of engaging in the same business activity.

* * * * * * *

[fol. 180] Respectfully submitted,

Snell & Wilmer, By Edward Jacobson, Attorneys for Appellant.

[fol. 181]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

No. 7026

[Title omitted]

EXCERPT FROM RESPONSE TO PETITION FOR REHEARING—
Filed December 30, 1963

* * * * * * *

[fols. 183-184]

IV

The taxpayer herein raises a question that is, strictly speaking, outside of the record. It mentions the fact that one Arizona tribe with the permission of the Secretary of the Interior had adopted a tax of its own similar to the state tax. The taxpayer then argues that this is an interference with tribal government for the reason apparently that two "sovereignties" are taxing the same thing. However, we are cited no cases and can find none holding that two tax levying bodies cannot tax the same business, the same transaction, or even the same property. After all, both the state and the United States tax income, the state, county, city, high school, common school and junior college districts all tax the same land and the state, city and federal government tax certain business transactions. (The federal tax is limited to luxuries and miscellaneous items such as tires, but the principle is the same.) The fact that two bodies both tax the same thing does not defeat the autonomy of either.

* * * * * * *

[fol. 186] Respectfully submitted,

Robert W. Pickrell, The Attorney General, Philip M. Haggerty, Assistant Attorney General, Attorneys for Appellees.

[fol. 187]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

January 8, 1964

No. 7026

[Title omitted]

NOTICE OF MINUTE ENTRIES OF ORDERS OF JANUARY 7, 1964—ORDER DENYING MOTION FOR REHEARING, ETC.

The following action was taken by the Supreme Court of the State of Arizona on January 7, 1964, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing—DENIED. Justices Lockwood and Jennings voted to grant.

ORDER: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

ORDER: Petition of Papago tribe to intervene and to file brief Amicus Curiae—DENIED, as extending the issues. Bristor v. Cheatham, 75 Ariz. 227, 255 P. 2d 173."

Sylvia Hawkinson, Clerk, By L. Brooks, Assistant Clerk.

To—

Snell & Wilmer, 400 Security Building, Phoenix, Arizona;

Attorney General, Attention: P. M. Haggerty, Phoenix, Arizona;

Walter F. Wolf, Jr., P.O. Box 177, Window Rock, Arizona;

Edward B. Berger, 500 Phoenix Title Bldg., Tucson, Arizona.

[fol. 188]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

MANDATE—January 13, 1964

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa.

Greeting:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between

Case No. 101942

WARREN TRADING POST COMPANY, a corporation, Plaintiff,

v.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as Members of the Arizona State Tax Commission, and THE ARIZONA STATE TAX COMMISSION, Defendants,

---

said Superior Court on October 7, 1959 entered the following Summary Judgment:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the defendants, as constituting the members of the Arizona State Tax Commission, and the Arizona State Tax Commission, have summary judgment against plaintiff for transaction privilege taxes assessed by the defendants against the plaintiff for sales of tangible personal property made by plaintiff, as a licensed Indian trader, to Reservation Indians, which sales were made by plaintiff at its Trading Post on the Navajo Indian Reservation within the State of Arizona, between the 1st day of November, 1956, to and including the 31st day of December, 1957, in the total amount of $2,886.49, together with inter-
[fol. 189] est thereon at the rate of ½ of 1% per month, or fraction of a month, from the date of this judgment until paid."

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

[fol. 190] And Whereas, in April, in the year of our Lord one thousand nine hundred and sixty-three, the said cause came on to be heard before the said Supreme Court, and was submitted for decision after argument of counsel.

On Consideration Whereof, it was on the fourth day of December in the year of our Lord one thousand nine hundred and sixty-three, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on December 19, 1963, Appellant filed Motion for Rehearing, on consideration of which the Court on January 7, 1964, ordered that the Motion for Rehearing be denied and further ordered: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

[fol. 191] You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable Jesse A. Udall, Chief Justice of the Supreme Court of the State of Arizona, the thirteenth day of January, in the year of our Lord one thousand nine hundred and sixty-four.

Sylvia Hawkinson, Clerk of the Supreme Court of the State of Arizona.

[fol. 192] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF ARIZONA

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 1, 1964

I. Notice is hereby given that Warren Trading Post Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the Mandate, issued by the Supreme Court of the State of Arizona to the Superior Court of Maricopa County on January 13, 1964, which Mandate (pursuant to Arizona Supreme Court Rule 14(a)) constitutes the judgment enforcing the Decision of the Supreme Court of the State of Arizona entered on December 4, 1963, which Decision became final by the Order of the Supreme Court of the State of Arizona denying rehearing entered January 7, 1964, and which Decision affirmed the judgment of the Superior Court of Maricopa County entered in this action on October 7, 1959.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

[fol. 193] II. The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

(a) Abstract of Record on Appeal, filed March 30, 1960.

(b) Appellant's Opening Brief, filed July 29, 1960.

(c) Supplemental Abstract of Record, filed September 8, 1960.

(d) Appellees' Reply Brief, filed September 16, 1960.

(e) Appellant's Reply Brief, filed October 14, 1960.

(f) Decision of the Supreme Court of the State of Arizona, entered December 4, 1963.

(g) Appellant's Motion for Rehearing with Memorandum in Support thereof attached thereto, filed December 19, 1963.

(h) Response to Petition for Rehearing, filed December 30, 1963.

(i) Minute Entries of Orders of the Supreme Court of the State of Arizona rendered on January 7, 1964 (which, among other actions, denied the Motion for Rehearing).

(j) Copy of Mandate, issued January 13, 1964.

(k) This Notice of Appeal.

III. The Supreme Court of Arizona has construed A.R.S. § 42-1312.A (being that portion of the Arizona Transaction Privilege Tax which levies a tax upon the privilege of engaging in the business of selling tangible personal property at retail which tax is measured by the [fol. 194] gross proceeds of sales or gross income from the business) as being applicable to and authorizing a tax upon an Indian Trader licensed under 25 U.S.C. §§ 261-264, whose trading post is located on a portion of the Navajo Indian Reservation lying within the boundaries of the State of Arizona, and who is there engaging in the business of making retail sales to Indians living upon the Reservation.

The basic question presented is:

Whether A.R.S. § 42-1312.A as so construed is invalid as being repugnant to and a violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution which states:

"Section 8. The Congress shall have power . . .

"To regulate Commerce . . . with the Indian Tribes; . . ."

The foregoing basic question is intended to include every subsidiary question fairly comprised therein including but not limited to:

(a) Whether transactions of the character above described constitute " . . . Commerce . . . with the Indian Tribes . . . " within the purview of Article I, Section 8, Clause 3 of the United States Constitution.

(b) Whether the Arizona Transaction Privilege Tax (including but not limited to that section thereof referenced in the basic question) is, in fact, a privilege tax upon the privilege of engaging in a variety of named businesses measured by the gross proceeds of sales or gross income therefrom.

(c) Whether any application of a State Privilege Tax [fol. 195] upon " . . . Commerce . . . with the Indian Tribes . . . " constitutes, per se, an undue burden upon such commerce; or whether, contrariwise, such application factually must be proved to be inconsistent with, contrary to, burdensome upon or in frustration of federal laws and purposes before such tax would be held to constitute an undue burden thereon, and whether in the event the latter be the case, the facts set forth in the record of this case constitute such a factual showing as to amount to an undue burden.

(d) Whether a State Privilege Tax which constitutes an undue burden upon " . . . Commerce . . . with the Indian Tribes . . . " is invalid as being repugnant to and in violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution set forth in the basic question above.

(e) Whether the Buck Act (4 U.S.C. §§ 105-110) is applicable to Indian Reservations lying within the boundaries of the several states; and if applicable, whether the Buck Act as so construed is itself invalid as being repugnant to and a violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution set forth in the basic question above.

Filed this 1st day of April, 1964.

Snell & Wilmer, By: Edward Jacobson, Attorneys for Warren Trading Post Company, Appellant.

Proof of Service (omitted in printing).

[fol. 197] Triple Certificate to foregoing transcript (omitted in printing).

[fol. 199]

SUPREME COURT OF THE UNITED STATES

No. 115, October Term, 1964

WARREN TRADING POST COMPANY, Appellant,

vs.

ARIZONA STATE TAX COMMISSION, et al.

Appeal from the Supreme Court of the State of Arizona.

ORDER NOTING PROBABLE JURISDICTION—October 12, 1964

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

Office Supreme Court, U.S.
FILED
MAY 23 1964
JOHN F. DAVIS, CLERK

No. [redacted] 115

In The Supreme Court of the United States

OCTOBER TERM, 1963

WARREN TRADING POST COMPANY, a corporation,

Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,

Appellees.

JURISDICTIONAL STATEMENT

EDWARD JACOBSON
Attorney for Appellant
400 Security Building
Phoenix 4, Arizona

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No.

In The Supreme Court of the United States

OCTOBER TERM, 1963

WARREN TRADING POST COMPANY, a corporation,

Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

JURISDICTIONAL STATEMENT

This case is one of first impression under the Commerce Clause of the United States Constitution. It involves the constitutionality of a state statute and regulation licensing and taxing the privilege of engaging in commerce with the Indian Tribes.

Appellant Warren Trading Post Company (Trading Post) appeals to the Supreme Court of the United States from the judgment of the Arizona Supreme Court issued January 13, 1964. Trading Post submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at 95 Ariz. 110, 387 P.2d 809 (1963), and is reprinted as Appendix A. Rehearing was denied without opinion. The Superior Court's decision is not reported and is reprinted as Appendix B. The judgment appealed from (being the Mandate) and the order denying rehearing are reprinted as Appendix C.

JURISDICTION

On August 26, 1958, Trading Post filed a complaint for declaratory judgment in the Superior Court of Arizona in and for the County of Maricopa, pursuant to Arizona Revised Statutes §§ 12-1831 et seq. (the Uniform Declaratory Judgments Act) and Arizona Revised Statutes § 41-1007 (the declaratory judgment remedy section of the Arizona Administrative Procedure Act).

The action resulted from a corrected assessment of Arizona Transaction Privilege Taxes levied upon Trading Post by the Arizona State Tax Commission (Commission) pursuant to Arizona Revised Statutes § 42-1312.A and Regulation 2.18.5 of the Commission's Combined Privilege Sales and Use Tax Regulations.

The declaratory judgment action was brought in order to secure a declaration that the statute and regulation, as construed and applied by the Commission, were invalid as a violation of Article I, Section 8, Clause 3 of the United States Constitution.

On October 7, 1959, the Superior Court entered summary judgment adverse to Trading Post.

On December 4, 1959, Trading Post filed notice of appeal to the Supreme Court of Arizona.

On December 4, 1963, the Arizona Supreme Court affirmed the lower court and rendered a written opinion.

On January 7, 1964, the Arizona Supreme Court denied rehearing, reflected in a minute entry of the same date.

On January 13, 1964, the Supreme Court of Arizona issued its Mandate to the Superior Court containing the judgment enforcing

the Arizona Supreme Court's decision and opinion entered December 4, 1963. 17 Arizona Revised Statutes, Supreme Court Rule 14(a).

On April 1, 1964, in the Supreme Court of Arizona, Trading Post filed notice of appeal from the Mandate to the Supreme Court of the United States.

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U.S.C. § 1257(2).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Central R. Co. of Pennsylvania v. Pennsylvania,* 370 U.S. 607, 608 (1962); *Memphis Steam Laundry Cleaner v. Stone,* 342 U.S. 389 (1952); *Kansas City Southern Ry. Co. v. Road Improvement Dist. No. 3,* 266 U.S. 379, 385, 386 (1924); *Eureka Pipe Line Co. v. Hallanan,* 257 U.S. 265, 269, 270, 271 (1921); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282, 288, 289 (1921); *Merchants' Nat. Bank v. Richmond,* 256 U.S. 635, 637 (1921).

STATUTES INVOLVED

Article I, § 8, cl. 3 of the United States Constitution provides:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

The following provisions of the United States Code are material:

19 Stat. 200 (1876), 25 U.S.C. § 261 provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 25 U.S.C. § 262 provides:

> "Any person desiring to trade with the Indians on any

Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

22 Stat. 179 (1882), 25 U.S.C. § 264 provides in material part:

"Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: . . ."

The following provisions of the Arizona Revised Statutes are pertinent:

Arizona Revised Statutes § 42-1308 provides in part:

"A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license . . . ."

* * *

"F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days."

Arizona Revised Statutes § 42-1309 in part reads:

"A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce

or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, . . ."

Arizona Revised Statutes § 42-1312 provides in material part:

"A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, . . ."

Arizona State Tax Commission, Combined Privilege Sales and Use Tax Regulation 2.18.5 provides:

"*Trading Posts on Indian Reservations.* A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

Related statutes and regulations involved in this appeal are as follows:

61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110 (Buck Act)

R.S. § 2132, 25 U.S.C. § 263

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958)

Arizona Revised Statutes §§ 42-1301.2, .6, .8, .11, .13, .14 and .15; 42-1305

All of the foregoing are printed in full as Appendix D.

QUESTION PRESENTED

The Supreme Court of Arizona has construed Arizona Revised Statutes §§ 42-1308, 42-1312.A and Commission Regulation 2.18.5 as requiring a license for and authorizing a tax upon the privilege of making retail sales of tangible personal property to reservation Indians living upon the reservation, by an Indian Trader licensed under 25 U.S.C. §§ 261-264, whose trading post is located on the Navajo Indian Reservation in the State of Arizona.

The basic question presented is:

> Whether Arizona Revised Statutes §§ 42-1308, 42-1312.A and regulation 2.18.5 as so construed are invalid as being repugnant to and in violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes;"[1]

STATEMENT OF THE CASE

Arizona has had a Transaction Privilege Sales Tax since the spring of 1935. § 1, Art. 2, Ch. 77, Session Laws of Arizona (1935). Among other things, it licenses and taxes the privilege of engaging in the business of making retail sales of tangible personal property in Arizona.

During all of this period, and before, the Congress of the United States had invested the Commissioner of Indian Affairs with the sole power and authority to license and appoint traders to the Indian Tribes and to make rules and regulations governing their activities, including specifying the kind and quantity of goods they might sell and the prices at which such goods could be sold to the Indians. 19 Stat. 200 (1876), 25 U.S.C. §§ 261-262. And, pursuant to his authority, the Commissioner of Indian Affairs has made and issued rules and regulations to govern the conduct and

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[1] The Stipulation of Facts before the Superior Court did not concern (1) off-reservation sales to Indians or non-Indians or (2) on-reservation sales to non-Indians. That Stipulation confined this case solely to a consideration of on-reservation sales to Indians. Transcript of Record 69 (T.R. 69).

affairs of the Indian Traders. 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). Trading without such a license subjects a person to serious penalties. 22 Stat. 179 (1882), 25 U.S.C. § 264.

In the spring of 1940 the First Assistant Solicitor of the Department of Interior (by formal written opinion) specifically held licensed traders' sales to Indians not to be subject to the Arizona Transaction Privilege Tax. 57 I.D. 124 (1940). Three years later this opinion (again formally) was reaffirmed. 58 I.D. 562 (1943). To date, there has been no change in the position of the Department of Interior.

Appellant Trading Post is a corporation organized and existing under the laws of Arizona (T.R. 4).[2] It is licensed by the United States Commissioner of Indian Affairs to conduct a trading post at Kayenta on the Navajo Indian Reservation in Navajo County, Arizona, on lands leased by it from the Navajo Indian Tribe (T.R. 5).

On February 25, 1958, the Commission made a corrected assessment of Arizona Transaction Privilege Taxes against Trading Post under Arizona Revised Statutes § 42-1312.A and Commission Regulation 2.18.5 (T.R. 6). This $2,886.49 assessment was levied upon Trading Post's privilege of making retail sales of tangible personal property to reservation Indians from its store on the reservation during the period November 1, 1956 to December 31, 1957 (T.R. 6). But for one prior attempt in 1957, later cancelled, this was the first such assessment the Commission had made upon a licensed Indian Trader since the inception of the Arizona Transaction Privilege Tax in 1935. (Appendix A 11, 12; T.R. 166).

On August 26, 1958, Trading Post brought a declaratory judgment action in the Superior Court of Arizona in and for the County of Maricopa (T.R. 4-12). The Superior Court held against Trading Post, basing its opinion largely upon the following reasoning:

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[2] Fact Stipulation No. 3 provides that all facts alleged in Trading Post's complaint are admitted, except for two which are not pertinent to this Statement of the Case (T.R. 68, 69).

> "It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* [the Court having previously cited *Thomas v. Gay*, 169 U.S. 264 in support of that proposition] and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned." (Emphasis the court's.) (Appendix B1).

The Superior Court saw no difference at law between the state's right to levy a personal property tax upon the personal property of an Indian Trader, and a state's right to levy a privilege tax on the privilege of engaging in commerce with the Indian Tribes.

Trading Post then appealed to the Arizona Supreme Court (T.R. 27-29). The majority opinion of that Court affirmed the opinion of the trial court, while the dissent adopted and presented Trading Post's position in full (Appendix A).

The majority opinion's conclusion is that the tax is neither burdensome on nor inconsistent with federal purposes or laws (Appendix A9).

The dissent is based on the proposition that any privilege tax upon the privilege of engaging in commerce with the Indian Tribes is prohibited by Article I, Section 8, Clause 3 of the United States Constitution, since Indian commerce, like interstate and foreign commerce, is an area which has been reserved exclusively for (and actually occupied by) federal regulation (Appendix A10, 12-15).

HOW THE FEDERAL QUESTION WAS PRESENTED

Trading Post's Complaint:

Trading Post's complaint requested the Superior Court of Arizona to declare, among other things, that the tax imposed by the Commission under Arizona Revised Statutes § 42-1312 and Regulation 2.18.5 constitutes (1) "an interference with the exclusive power of the Congress to regulate commerce with the Indian Tribes as provided in Section 8, Article I of the Constitution of the United States" (T.R. 8, 11); and (2) "an interference with the right of the Commissioner of Indian Affairs to fix the price at

which commodities handled by a licensed Indian Trader should be sold" (T.R. 11).

Commissioner's Answer:

The Commission admitted the factual allegations of the complaint but answered further that (1) "the tax imposed . . . is a valid exercise of the sovereign taxing powers . . . under [Arizona Revised Statutes] A.R.S. § 42-1312 . . ."; (2) that "the assessment is made under . . . a valid, lawful and constitutional regulation . . . [which] regulation does not constitute an interference with the exclusive power of Congress to regulate commerce with the Indian tribes, nor . . . violate the Constitution of the United States"; and (3) that the tax imposed "does not constitute an interference with any rights of the U.S. Commissioner of Indian Affairs" (T.R. 16, 17). Accordingly, the Commission prayed

> "that the tax imposed by the State Tax Commission be upheld and declared valid, and that the rules and regulations upon which the tax is based be upheld and declared valid." (T.R. 19.)

Memorandum Opinion of Superior Court of Arizona:

The Superior Court granted summary judgment in favor of the Commission, upholding the validity of the tax by finding there was no interference by the state with federal functions (Appendix B1).

Trading Post's Opening Brief to the Arizona Supreme Court:

On appeal to the Arizona Supreme Court, the Trading Post by its assignments of error, propositions of law and discussion in its brief renewed its contention that the Arizona tax statute and regulation were an infringement upon the powers granted to the federal government under the Commerce Clause of the Constitution (T.R. 40, 41, 57, 62).

Trading Post's Proposition of Law No. 3 specifically stated:

"A STATE PRIVILEGE TAX ON A LICENSED INDIAN TRADER INTERFERES WITH THE SOLE

POWER OF CONGRESS TO REGULATE COMMERCE WITH THE TRIBES AND IS INVALID." (Emphasis contained in the brief.) (T.R. 41, 42, 57).

The discussion of this proposition of law in the brief concluded as follows:

"We submit that sales of merchandise by a licensed Indian Trader to an Indian Tribe or to the individual Indian of that tribe on the Reservation constitute commerce with the Indian Tribes within the meaning of Article I, Section 8, Clause 3 of the Constitution and that any state imposed tax for the privilege of carrying on such commerce is invalid." (T.R. 62.)

Opinion and Dissent of Arizona Supreme Court:

The Arizona Supreme Court's majority opinion, after citing the applicable statutes (Arizona Revised Statutes §§ 42-1308 and 42-1312), concluded as follows:

"We restate our basic conclusions.

• • •

"Second, the test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws.

"Under the stipulated facts of this case we hold that the Arizona exaction as applied to the appellant [Trading Post] does not thwart the will of Congress in its treatment of its Indian wards nor is it inconsistent with the power of Congress to regulate trade with the Indian tribes.

"The judgment of the court below is affirmed." (Appendix A9).

Justice Lockwood dissented, stating in part:

"In my opinion, Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians—an area of commerce delegated exclusively to the federal government in the Commerce Clause and a privilege granted solely by the Commissioner of Indian Affairs under 25 U.S.C. § 262." (Appendix A10).

Trading Post's Motion for Rehearing and Supreme Court's Denial thereof:

Trading Post's Motion for Rehearing again raised the federal question (T.R. 161-164). The Motion was denied without further opinion by the Arizona Supreme Court (Appendix C1).

THE FEDERAL QUESTION IS SUBSTANTIAL

The question presented is one of first impression under the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3, United States Constitution): Can a state license and tax the privilege of engaging in "... Commerce ... with the Indian Tribes;"?

The tax concerned is a privilege tax on the privilege of engaging in certain businesses. Arizona Revised Statutes § 42-1308.A; *Warren Trading Post Company v. Moore,* 95 Ariz. 110, ..., 387 P.2d 809, 811 (1963); *Arizona State Tax Commission v. Garrett Corp.,* 79 Ariz. 389, 390, 393, 291 P.2d 208, 209, 210 (1955); *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 284, 289, 226 P.2d 549, 552, 555 (1951).

And the phrase "... Commerce ... with the Indian Tribes;" as used in Article I, Section 8, Clause 3, United States Constitution, includes commerce with individual members of those tribes. *United States v. Holliday,* 3 Wall. 407, 417 (1866).

Nor does the "Buck Act" return to the states the right to levy a privilege tax upon Indian commerce. Instead, that act relates to persons residing or transacting business in "federal areas," the definition of which phrase does not include Indian reservations. 61 Stat. 641 (1947), 4 U.S.C. § 110(e); *Your Food Stores v. Village of Espanola,* 68 N.M. 327, 334, 361 P.2d 950, 955, 956 (1961). In any event, the immunity from state taxation of an Indian Trader is not a consequence of his physical situs on an Indian reservation but of the commerce he conducts with the Indian Tribes, the regulation of which is exclusively within the domain of the United States (Appendix A21). See 58 I.D. 562 (1943).

It would appear "... beyond dispute that a State may not lay a

tax on the 'privilege' of engaging in interstate commerce . . ." *Portland Cement v. Minnesota*, 358 U.S. 450, 458 (1959). See *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389 (1952); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1924); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1924).

Equally settled is the prohibition against the levy by a state of a tax upon the privilege of engaging in foreign commerce. *Crew Levick Company v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827).

This limitation of states' powers should apply with equal force to commerce with the Indian Tribes, absent a plain and intelligible reason to the contrary. *Gibbons v. Ogden*, 9 Wheat. 1, 193 (1824). The power of Congress over Indian commerce is not less than its power over interstate commerce. *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 619 (1903).

If there be any difference, it would appear that Congressional power is greater with respect to Indian commerce than with the other two commercial areas. In earlier days, no state law had any force upon the reservation. *Worcester v. Georgia*, 6 Pet. 515 (1832). And while this rule has been somewhat modified, the basic policy has remained to the extent that when Congress has wanted the states to exercise power over the reservations, it has done so by express grant. This Court has held that only by express Congressional grant may the states gain such power. *Williams v. Lee*, 358 U.S. 217, 221, 223 (1959).

However, Congress did not grant power over Indian commerce to the states. Instead, Congress granted the sole power and authority to the Commissioner of Indian Affairs to appoint Indian Traders and regulate their commerce with the Indians. 19 Stat. 200 (1876), 25 U.S.C. § 261. And the Commissioner has exercised his rule-making power thereunder. 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). Additionally, with federal consent, certain of the tribes themselves have imposed their

own privilege tax upon commerce with the Indians (T.R. 162, 175, 176). But without federal consent even the tribes would be excluded from this arena by the sole power of the Commissioner to regulate Indian Traders. 60 I.D. 176 (1948). Finally, the special duties and powers of a guardian to protect his ward have long been recognized as being applicable in this forum. *United States v. Kagama,* 118 U.S. 375, 384 (1886).

Yet, the Superior Court and the Supreme Court of Arizona both declined to apply to Indian commerce the settled law prohibiting the states from taxing the privilege of engaging in interstate or foreign commerce.

The Superior Court found no distinction between personal property taxes and directly licensing and taxing the privilege of engaging in Indian commerce.

Distilled to its essence, the majority opinion of the Arizona Supreme Court bases its conclusion (that the states may legislate with respect to commerce unless such is clearly inconsistent with or burdensome upon federal purposes) upon four decisions of this Court. *Southern Pacific Co. v. Arizona,* 325 U.S. 761 (1945); *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148 (1942); *California v. Zook,* 336 U.S. 725 (1949); *Cooley v. Board of Wardens,* 12 How. 299 (1851).

These decisions do indicate that certain areas of commerce are open to the concurrent control of Congress and the several states. The misconception engaged in by the majority opinion of the Arizona Supreme Court is that the right to license and tax commerce is within the perimeters of those areas. Such is not the holding of those cases. The exercise of this right by the states could not pass the tests for concurrent jurisdiction set forth therein. The majority opinion of the Arizona Supreme Court pointedly ignores the pertinent decisions of this Court which relate to licenses and privilege taxes upon commerce wherein the necessity for exclusive federal control is established.

It is urgent that this Court correct the error committed below at

the earliest opportunity. Even now, the decision of the Arizona Supreme Court in this case has been followed as a precedent by the District Court for Santa Fe County, New Mexico in Cause No. 32849 entitled "Paul E. Brink, dba Brink Trading Co., Plaintiff, vs. Bureau of Revenue State of New Mexico, Defendant." On facts substantially identical to those presented here, the court there stated in part:

> "Lest there be any misunderstanding it is well to point out specifically that this Court is not basing its decision on the basis that the Buck Act is applicable to the Navajo Tribe, but rather on the basis as outlined in the majority opinion of the Arizona Supreme Court in the *Warren Trading Post Co.* case, supra." (Opinion dated February 5, 1964, Montoya, J.)

We are advised that an appeal from this decision to the Supreme Court of New Mexico has been taken and is now pending.

Twenty-five states contain Indian reservations on which 471,938 Indians reside.[3] Of these states, all but four have a "sales" tax.[4] Therefore, it would appear reasonable to expect the question presented by this case to recur.

The economic impact of the decision appealed from extends far beyond the parties to this litigation. To the extent that the increased cost of doing business is ultimately reflected in increased prices, any privilege tax imposed upon the Indian Traders inevitably will constitute an additional burden upon the Indians themselves. Further, such tax would constitute an interference with the express purposes and plans of Congress to accomplish a rehabilitation and development of certain Indian tribes. Navajo Hopi Rehabilitation Act of April 19, 1950, P.L. 474, ch. 92. To the extent that the

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[3] These States are Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. *United States Indian Population and Land*, 1962, U.S. Dep't of Interior, Bureau of Indian Affairs.

[4] Idaho, Minnesota, Nebraska and Oregon. 1 C.C.H. Sales Tax Reporter, par. 301, pp. 601-07.

Commissioner of Indian Affairs does not permit the Indian Traders to pass the tax on, it will constitute an increased burden to all Indian Traders. Additionally, the matter is one of economic significance to all states containing Indian reservations which now have or may later adopt sales or privilege taxes.

Also, there is a conflict between the rights of Indian Tribes (with federal approval) to license and levy taxes on commerce within their reservations, and the rights of the states to license and impose similar taxes on that same commerce. The Papago Indian Tribe in Arizona, with the approval of the Department of the Interior, has recently enacted its own privilege transaction tax on federally licensed Indian Traders making reservation sales (T.R. 162, 175, 176). Resolution 43, Ordinance of the Papago Council, approved July 22, 1963. If the Arizona Supreme Court's decision is permitted to stand, Indian Traders will be subject to double licensing and taxation for the same privilege.

Finally, this case involves a sharp head-on collision between the United States and the State of Arizona — a clash between federal and state power to regulate commerce with Indian Tribes. That conflict is reflected in the directly opposing views of the two opinions of the United States Department of Interior on the one hand, and the Arizona Supreme Court's decision in this case on the other. 57 I.D. 124 (1940); 58 I.D. 562 (1943); Appendix A. It is reflected again in the dichotomy between the "... sole power and authority ..." given by Congress to the Commissioner of Indian Affairs (19 Stat. 200 [1876], 25 U.S.C. § 261) and to his predecessors since the beginning of the Republic (Act of July 22, 1790, 1 Stat. 137), and Arizona's asserted authority to license and tax commerce with the Indians conducted by Trading Post in this case. This conflict is real, not theoretical. These problems, we submit, should finally be resolved by this Court.

The case is appealed pursuant to 28 U.S.C. § 1257(2) from the highest court of the State of Arizona, the Arizona Supreme Court. Article VI, Sections 1, 3, 5, Constitution of Arizona. The appeal is taken from the Supreme Court's Mandate, which "... shall contain

the judgment of . . . [the Arizona Supreme] Court . . ." 17 Arizona Revised Statutes, Arizona Supreme Court Rule 14(a); see Appendix C 1-3. That judgment became effective as of the date of the Mandate, January 13, 1964. *Borrow v. El Dorado Lodge*, 75 Ariz. 218, 220, 254 P.2d 1027, 1028, 1029 (1953). It constitutes the final judgment of a final court. *Market Street Ry. Co. v Railroad Commission of California*, 324 U.S. 551 (1945). It is not subject to further correction or review. Any actions taken by the Arizona Superior Court in carrying out the judgment are ministerial. *Gusick v. Eyman*, 81 Ariz. 182, 184, 302 P.2d 944, 945 (1956).

The decision of the Arizona Supreme Court affirmed the decision of the Superior Court of Arizona, in and for the County of Maricopa. Both courts sustained the validity of the imposition of the Arizona Transaction Privilege Tax against the contention that it was invalid as being contrary to Article I, Section 8, Clause 3 of the United States Constitution. *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). Both courts based their opinion solely upon federal grounds (Appendices A and B). The federal question was timely raised, and so presented as to qualify for an appeal pursuant to 28 U.S.C. § 1257(2). *New York ex rel Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

CONCLUSION

This appeal raises a single and important federal question of first impression applied to undisputed facts. It is respectfully submitted that the question is sufficiently substantial that for proper resolution and plenary consideration, it requires briefs on the merits and oral argument. Can a State license and tax the privilege of selling to Indians on reservations — a privilege which the United States has exclusive power and discretion to grant or withhold? The determination of this problem is necessary to fix the boundaries of power between the Federal Government, the States and the Indian Tribes with respect to the control of Indian commerce.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of the State of Arizona of December 4, 1963

Appellant, Warren Trading Post Company, appeals from a judgment determining that certain taxes are due to the State of Arizona by reason of retail sales of personal property to reservation Indians residing on the Navajo Indian Reservation.[1]

The Arizona exaction arises out of the provisions of the Arizona Privilege Transaction Act, A.R.S. § 42-1308, requiring every person within Arizona[2] who receives gross proceeds of sale or gross income from sales to acquire a license for a fee of $1.00. A.R.S. § 42-1312 imposes a tax measured by an amount equal to 2% of the gross proceeds of sales or gross income on the privilege of selling any tangible personal property at retail.[3]

In considering collectively the arguments presented, we observe certain conclusions which weigh heavily in the decision.

Tax immunity is never enjoyed as a matter of right but only as an incidental windfall when, and only as long as, imposition of the state tax impairs or interferes with the exercise of a federal

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[1]Appellant, a domestic corporation, licensed as an Indian trader by the Commissioner of Indian Affairs under Act of Congress, 22 Stat. 179, 25 U.S.C. §§ 261, 264, is authorized by Article III of its Articles of Incorporation to, among other things: (a) Buy, own, hold, sell, barter, pledge, hypothecate cattle and other livestock and in general to conduct and carry on a ranch and livestock business. (b) Deal in cattle and property. (c) Lend money. (d) Deal in shares of stock, bonds, promissory notes. (f) Buy, sell, hold and lease or construct reservoirs, canals, dams. (i) Carry on the business of purchasing, manufacturing, producing, selling, and dealing in goods and wares, merchandise and materials of every kind. (m) Maintain in addition to its principal office at Flagstaff, Arizona, one or more offices for the transactions of its business either within or without the State of Arizona.

[2]Indian reservations are within the political, governmental and geographical boundaries of Arizona. Enabling Act, § 20 (2); Draper v. United States, 164 U.S. 240, 41 L.Ed. 419, 17 S.Ct. 107; Harrison v. Laveen, 67 Ariz. 337, 196 P.2d 456; Porter v. Hall, 34 Ariz. 308, 271 P. 411.

[3]The stipulation as to facts in the lower court specifically confined the question to taxes on sales to reservation Indians who reside on an Indian reservation. We assume that taxes arising out of sales to others on the Navajo Reservation have been paid and therefore the right of the state to levy and collect such taxes is not questioned.

function. Petition of S.R.A., Inc. v. State of Minnesota, 219 Minn. 493, 18 N.W.2d 442, affirmed 327 U.S. 558, 90 L.Ed. 851, 66 S.Ct. 749. The immunity here claimed represents a severe impairment of the taxing power of Arizona. It is one we would not be disposed to sustain unless we entertained grave doubts but that a federal function was impaired.

We have repeatedly held that this tax is on the privilege or right to engage in business and is not a sales tax although generally referred to as such, that it neither imposes a tax on the purchaser nor upon sales but rather taxes the seller for the privilege of engaging in business, that the tax is the direct obligation of the retailer and not that of the consumer, and further that there is no statutory authority for the retailer to attempt to constitute himself an agent of the state for the purpose of receiving the tax and transmitting it to the state. The legal incidence of the tax falls upon the seller and not upon the buyer.[4] Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208; State Tax Commission v. Quebedeaux Chevrolet, 71 Ariz. 280, 226 P.2d 549.

Were appellant an instrumentality of the United States Government by reason of its being licensed to do business with the Indians under the appropriate acts of Congress,[5] no exemption is to be implied.[6] Alabama v. King & Boozer, 314 U.S. 1, 86 L.Ed. 3, 62 S. Ct. 43, 140 A.L.R. 615. Exemption of the person upon whom the legal incidence of the tax falls is not to be implied regardless

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[4]The determination of the incidence of the tax by the state court is controlling, Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 86 L.Ed. 65, 62 S.Ct. 1, absent facts or construction upon which Federal Constitutional issues rest. Kern-Limerick v. Scurlock, 347 U.S. 110, 98 L.Ed. 546, 74 S.Ct. 403.

[5]The Navajo Tribe of Indians, Amicus Curiae, asserts that the Warren Trading Post Company is not a federal instrumentality.

[6]Appellant, as a licensee of the federal government, can scarcely claim a better position as an instrumentality by which the government accomplishes its purposes than an employee of the federal government, Graves v. New York, ex rel O'Keefe, 306 U.S. 466, 83 L.Ed. 927, 59 S.Ct. 595; or a contractee, James V. Bravo Contracting Co., 302 U.S. 134, 82 L.Ed. 155, 58 S.Ct. 208. See Alvard v. Johnson, 282 U.S. 509, 75 L.Ed. 496, 51 S.Ct. 273, 75 A.L.R. 9.

of the fact that the burden is passed on so long as Congress has not expressly exempted such person, Esso Standard Oil Co. v. Evans, 345 U.S. 495, 97 L.Ed. 1174, 73 S.Ct. 800. We conclude that the Navajo Indian Tribe, Amicus Curiae, is not entitled to assert a greater immunity from non-discriminatory taxation for traders with whom its members deal than the United States for its employees, contractees or other chosen agents, even were we certain that the economic burden must inevitably be shifted to the Indians.[7]

The Arizona exaction is non-discriminatory. It is not levied against Indians or Indian tribes as such but against all who engage in the business of selling within the geographical boundaries of the State of Arizona. The fact of legal title in the United States to the Indian lands is not sufficient to effect an exclusion of the state from excise taxes unless it appears that the state by consent or cession has transferred to the United States that residuum of jurisdiction which otherwise it would be free to exercise.[8] Silas Mason Co. v. Tax Commission of Washington, 302 U.S. 186, 82 L.Ed. 187, 58 S.Ct. 233. The authority of the state may rightfully extend to all matters not interfering with the Indian's protection by the government. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, 29 L.Ed. 542, 6 S.Ct. 246. The applicability of state law depends upon "whether the state action infringed on the right of

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[7] "• • • we cannot assume that Congress will choose to aid the Indians by permanently granting them immunity from taxes which they are as able as other citizens to pay. It runs counter to any traditional concept of the guardian and ward relationship to suppose that a ward should be exempted from taxation by the nature of his status, and the fact that the federal government is the guardian of its Indian ward is no reason, by itself, why a state should be precluded from taxing the estate of the Indian." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, 87 L.Ed. 1612, 63 S.Ct. 1284.

There is no suggestion arising out of the stipulated facts that the Indians are less able to pay this tax than other residents of Arizona of a like or similar economic status.

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. Const. amend. X.

reservation Indians to make their own laws and be ruled by them." Williams v. Lee, 358 U.S. 217, 220, 3 L.Ed.2d 251, 79 S.Ct. 269, reversing Lee v. Williams, 83 Ariz. 241, 319 P.2d 998.

Historically three powers of the Federal Government have been used to support congressional action in legislating on Indian affairs. The War Making Power was invoked by the First Congress on August 7th, 1789, by entrusting Indian affairs to the War Department. 1 Stat. 49, 50. It was the practice and policy of the federal government during the many years of tension between Indian and non-Indian to negotiate with the tribes and to settle differences by treaty if possible. See Worcester v. Georgia, 6 Pet. 515, 8 L.Ed. 483. After the Civil War, it was recognized that assimilation not segregation of the Indians was necessary[9] and the use of the Treaty Making Power to deal with Indians as dependent alien nationalities was terminated by Congress in 1871. One of the last treaties was entered into with the Navajo Indians in 1868, Cohen, Federal Indian Law, 24, 210. For a more detailed background of the Navajo Tribe see Williams v. Lee, 358 U.S. 217, supra.[10] Neither appellant nor Amicus Curiae, the Navajo Indian Tribe, assert a tax immunity arising out of or supported by the terms of the Navajo Treaty with the United States.

In 1886 the Supreme Court of the United States examined a congressional enactment prescribing criminal laws for Indians living on reservations. In sustaining the plenary power of Congress to act in behalf of the Indians, the court said:

"From their very weakness and helplessness, so largely due

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[9]See for further changes in the policy of Congress, Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed. 2d 573, 82 S.Ct. 562.

[10]"There are many cases * * * recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations and treaties with them have been looked upon not as contracts but as public laws which could be abrogated at the will of the United States." Choate v. Trapp, 224 U.S. 665, 670, 671, 56 L.Ed. 941, 32 S.Ct. 565. Treaty rights would, of course, pre-empt those areas affected thereby and would require congressional sanctions before effective state action.

> to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power." United States v. Kagama, 118 U.S. 375, 384, 30 L.Ed. 228, 6 S.Ct. 1109.

Since then, the recognized relation of tribal Indians together with the commerce clause of the U. S. Const., art. 1, § 8 (3), granting to Congress the power "to regulate commerce with the Indian tribes" have been treated as the sources of congressional power, see Williams v. Lee, 358 U.S. 217, supra; Perrin v. United States, 232 U.S. 478, 58 L.Ed. 691, 34 S.Ct. 387, Johnson v. Gearlds, 234 U.S. 422, 58 L.Ed. 1383, 34 S.Ct. 794, without always pointing specifically to either.

We do not doubt the plenary power of Congress to legislate in behalf of its wards by providing for them such federal services as education, health and reclamation, or that Congress may permit tribal self-government. The exercise of state jurisdiction may not impede the federal government in the treatment of its wards nor may it undermine the authority of the tribe in the exercise of self-government, Williams v. Lee, supra. Neither may it impair a right granted or reserved by federal law. Village of Kake v. Egan, supra. Otherwise state laws may be applied to Indians.

Congress has customarily carved out reservations from the unreserved public domain lying within the geographical boundaries of the state either to be owned or held by the Indian tribes. Utah & Northern R. Co. v. Fisher, 116 U.S. 28, supra. State law consistent with congressional legislation in behalf of its wards and with the tribal self-government is not excluded on these reservations.

> "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws save that the latter cannot affect the title of the United

States or embarrass it in using the lands or interfere with its right of disposal.

"A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. * * *" Surplus Trading Co. v. Cook, 281 U.S. 647, 650, 651, 74 L.Ed. 1091, 50 S.Ct. 455.

Generally, it may be said that state laws apply to the extent they do not conflict with federal Indian laws.

"Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony [or reservation], of such state laws as *conflict* with the federal enactments." United States v. McGowan, 302 U.S. 535, 539, 82 L.Ed. 410, 58 S.Ct. 286. (Emphasis supplied.)[11]

We do not find that Arizona by taxing appellant interferes with the United States in the use of reservation lands for the purposes for which they were established or that its tax tends to thwart the purpose of the federal government in caring for its Indian wards and leading them into the habits and ways of civilized life.

This brings us to the ultimate proposition advanced by the Navajo Indian Tribe that the commerce clause of the federal constitution by its own force creates an area of trade free from interference by the state. There is here equated the power to regulate commerce among the several states with the Indian tribes in the argument that the states are not allowed "one single — tax — worth of direct interference with the free flow of commerce." But we do not understand that the commerce clause provides an

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[11]See also New York ex rel Ray v. Martin, 326 U.S. 496, 90 L.Ed. 261, 66 S.Ct. 307; Draper v. United States, 164 U.S. 240, supra. Note too United States v. McBratney, 104 U.S. 621, 26 L.Ed. 869.

automatic pre-emption to the federal government of every area wherein conceivably Congress might act.

If there is an analogy to be drawn from the interstate commerce clause, still the possession of power in Congress does not exclude all state power. Southern Pac. Co. v. Arizona ex rel Sullivan, 325 U.S. 761, 89 L.Ed. 1915, 65 S.Ct. 1515. A state may legislate freely upon those phases of commerce which are left unregulated by the nation and if the prohibition of state action is only inferable from the scope and purpose of the federal legislation, it must be clear that state action is inconsistent with the federal provisions. Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 86 L.Ed. 754, 62 S.Ct. 491. Local authorities are not foreclosed from regulating matters of local concern merely because there may be some incidental but not burdensome effect on interstate commerce. Calif. v. Zook, 336 U.S. 725, 93 L.Ed. 1005, 69 S.Ct. 841; Cooley v. The Board of Wardens, 12 How. 299, 13 L.Ed. 996.

This brings us to the further assertion that the federal statutes on trading with Indians pre-empt the field of sales to Indians upon the Navajo Indian Reservation as against the Arizona Transaction Privilege Tax. By act of August 15, 1876, 25 U.S.C. § 261, Congress provided that:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

and by § 262:

> "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

It is argued that if appellant "proved his fitness to trade with the Indians to the satisfaction of the Commissioner of Indian

Affairs and secured a license from the Commissioner, he would thereupon have the right, whether or not he applied for or received a Transaction Privilege Tax License from the defendants [members of the State Tax Commission], to set up as a trader on the Navajo Indian Reservation." But we do not think it follows because appellant is licensed by the Commissioner of Indian Affairs to engage in trade that he has also been commissioned to disregard state laws. Rather, we would think that the Commissioner of Indian Affairs in considering whether a trader is a "proper person" would consider whether he will or has complied with such state laws as are constitutionally consistent with the licensee's business.

By the Arizona Enabling Act, § 20, 36 Stat. 557, 568, the people of this state agreed with the United States to forever disclaim all right and title to all lands lying within Arizona's boundaries owned or held by any Indian or Indian tribes and that "* * * until the *title* of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States." Absolute jurisdiction does not mean invariably exclusive jurisdiction; the word "absolute" carries the meaning of undiminished not exclusive. Village of Kake v. Egan, 369 U.S. 60, 7 L.Ed.2nd 573, 82 S.Ct. 562.

The same section of the enabling act further provides that "* * * all such lands shall be exempt from taxation by said state so long and to such extent as Congress has prescribed or may hereafter prescribe." The taxation here forbidden is that of reservation lands. There is no general ceding of the taxation authority of the state. Congress has not provided non-taxability from excises although it could have.

> "If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences." Oklahoma Tax Commission v. United States, 319 U.S. 598, 607, supra.

Moreover, any inference that this trader was intended by Congress to be relieved of the Arizona general non-discriminatory privilege transaction tax is to the contrary. By 61 Stat. 644, 4 U.S.C. §§ 105, 109, Congress authorized the states to extend sales taxes to persons residing on or carrying on their businesses and to transactions occurring in federal areas. While Congress specifically excluded Indians "not otherwise taxed," it did not purport to protect those who trade with Indians from taxation.[12]

We restate our basic conclusions.

First, assuming that appellant is an instrumentality of the United States government, no immunity from the tax will be implied.

Second, the test of state action irrespective of the sources of power is that state action must not be inconsistent with or burdensome to federal purposes or laws.

Under the stipulated facts of this case we hold that the Arizona exaction as applied to the appellant does not thwart the will of Congress in its treatment of its Indian wards nor is it inconsistent with the power of Congress to regulate trade with the Indian tribes.

The judgment of the court below is affirmed.

FRED C. STRUCKMEYER, JR., Justice

CONCURRING:

CHARLES C. BERNSTEIN, Chief Justice

JESSE A. UDALL, Vice Chief Justice

RENZ L. JENNINGS, Justice

LOCKWOOD, Justice (dissenting):

Chief Justice Waite has defined the judicial function in Minor v. Happersett, 21 Wall. 162 (1874) at 178:

"Our province is to decide what the law is, not to declare what it should be . . . . If the law is wrong, it ought to be

[12]We are not called upon to determine precisely the meaning of the of the [sic] language used by Congress. It is sufficient to say that Congress could have excluded appellant from the scope of the Arizona tax. But it did not.

changed; but the power for that is not with us."

In this case, I am convinced the majority of the Court misconceives what the law is in its concern over what the law in strict justice should be. The efforts of the federal government to protect the Indians may too long have held them as quasi-citizens living apart and lagging behind the rest of the nation in both privileges and proportionate responsibilities. Congress may have continued to hold too tightly its reins of control over commerce with tribal Indians. It may be that the system of favored "Indian traders" under license and control of the Commissioner of Indian Affairs is an anachronism in our modern economy. But it is not the function of this Court to change federal Indian policy. We should interpret, not amend the existing federal law and, on that basis, we should invalidate the tax in this case. In my opinion, Arizona lacks the power to impose a tax on the privilege of conducting commerce with the Indians — an area of commerce delegated exclusively to the federal government in the Commerce Clause and a privilege granted solely by the Commissioner of Indian Affairs under 25 U.S.C. § 262.

Before examining the relation between this privilege tax[1] and the Commerce Clause, the character of the problem in this case

[1]The following sections dealing with the transaction privilege tax are pertinent to this case. A.R.S. § 42-1308 provides in part: "A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the [Arizona state tax] commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license." * * * "F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days." [As amended, Laws 1956, Ch. 98, § 1.] Section 42-1309, in part reads: "A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted

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needs to be more sharply focused. The majority treats this as an "exemption" case and, consequently, interprets strictly against the taxpayer. This is wrong. No exemption for an Indian trader exists in Arizona statutes; the appellant admits this. This case involves the *scope* of the Arizona privilege tax. While taxing power is inherent in the sovereign states, the states delegated certain taxing powers to the federal government in the Commerce Clause.[2] Therefore in this case, we must determine whether the tax commission has trespassed upon an area of commerce delegated to the federal government.

Consequently, for the purpose of determining the scope of this tax, we should observe established rules of construction. First, when construing the ambit of a tax, as opposed to an exception to a tax, this Court has traditionally interpreted favorably to the taxpayer and strictly against the tax commission. Alvord v. State Tax Commission, 69 Ariz. 287, 213 P.2d 363 (1950). In addition,

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by persons on account of their business activities . . . ." And A.R.S. § 42-1312 reads as follows: "A. The tax imposed by sub-section A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail . . . ." Moreover, any person against whom this tax is levied may be enjoined from continuing in business until he has complied with the statute, A.R.S. § 42-1334.

[2]The states delegated to the federal government the exclusive power to tax the privilege of trading with Indians. Regarding another trade area included within the Commerce Clause, the United States Supreme Court stated in Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) at 608: "Taxing power is inherent in sovereign states, yet the states of the United States have divided their taxing power between the Federal Government and themselves. They delegated to the United States the exclusive power to tax the privilege to engage in interstate Commerce when they gave Congress the power 'To regulate Commerce with foreign Nations, and among the several states, [and with the Indian Tribes].' U.S. Const. Art. 1, § 8, cl. 3. While the reach of the reserved taxing power of a state is great, the constitutional separation of the federal and state powers makes it essential that no state be permitted to exercise, without authority from Congress, those functions which it has delegated exclusively to Congress." Hence, the statement in the majority opinion that, by the language of the Enabling Act and the Arizona Constitution, Arizona ceded only the power to tax reservation lands is misleading. This statement ignores the division of taxing power in the federal constitution.

since 1935 when the Twelfth Legislature adopted this tax until 1956 when the tax commission issued Regulation 2.18.5 taxing Indian traders, the commission in administering the law had not construed the tax statute as including Indian traders. Although long administrative interpretation is not controlling, the courts give weight to such an interpretation when construing the law. Alvord v. State Tax Commission, supra; Van Veen v. County of Graham, 13 Ariz. 167, 108 Pac. 252 (1910). And in cases concerning possible exercise of power by states over Indian affairs, the Supreme Court of the United States, on the basis of the Commerce Clause, appears to have raised a presumption against such state action. See, e.g., Williams v. Lee, 358 U.S. 217, 220-221 (1959); Kake Village v. Egan, 369 U.S. 60, 74-76 (1962); and Worcester v. Georgia, 6 Pet. 515, 561 (1832), Chief Justice Marshall's great decision which first announced this principle.

The all-important subject of this case is the relation between the Commerce Clause and the Arizona privilege tax. The Commerce Clause delegates to the federal government the power to control three trade areas: interstate, foreign, and Indian commerce. This congressional power over Indians has been described as a power as broad as that to regulate foreign commerce,[3] and broader than that to regulate interstate commerce.[4] Indeed, this federal power

[3]United States v. Forty-three Gallons of Whiskey, 93 U.S. 188 (1876), where the Supreme Court declared at 194: "Under the articles of confederation the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the States, provided that legislative right of a State within its own limits be not infringed or violated. [Article IX, Articles of Confederation.] Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—*a power as broad and as free from restrictions as that to regulate commerce with foreign nations.*" (Emphasis added.)

[4]See 1 Ops. Att'y Gen. 645 (1824); 1 Willoughby on the Constitution of the United States, 2d ed., § 226, p. 397; Story on the Constitution of the United States, § 1097; and, especially, Prentice and Egan, The Commerce Clause of the Federal Constitution, p. 342 (1898): "The purpose with which this power was given to Congress was not merely to prevent burdensome, conflicting or discriminating State legislation, but to prevent fraud and injustice upon the frontier, to protect an uncivilized people

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over Indians may justifiably be characterized as plenary.[5]

Each trade area in the Commerce Clause may have been delegated to the federal government for a different reason. But a principle common to all three trade areas emerges from the Commerce Clause. A long line of "interstate commerce" and "foreign commerce" cases reveals a prohibition which applies equally to this "Indian commerce" case: A state cannot tax the privilege of engaging in an area of trade delegated exclusively to the federal government in the Commerce Clause.

Historically, a tax phrased in terms of a privilege for engaging in interstate commerce has been considered beyond the power of the states.[6] *Any* such tax "burdens" interstate commerce. Alpha Portland Cement Co. v. Massachusetts, 268 U.S. 203, 217 (1925). Two recent cases restating this position that the Commerce Clause completely protects interstate commerce from state privilege taxes are Spector Motor Service v. O'Connor, 340 U.S. 602 (1951) and Memphis Steam Laundry Cleaners, Inc. v. Stone, 342 U.S. 389 (1952). A state has no power to tax the privilege of doing interstate commerce because it is a privilege granted by the federal, not the state government.

The United States Supreme Court has not only forbidden a state privilege tax as a condition precedent to the beginning of an interstate business, but it also has denied the power of a state to impose a tax on the privilege of doing an exclusively interstate business after the business has begun. Such taxes have been struck down even though they were fairly measured according to the connec-

from wrongs by unscrupulous whites, and to guard the white population from the danger of savage outbreaks. A grant made with such a purpose must convey a different power from one whose purpose was to insure the freedom of commerce. Congress has, in the case of the Indians, prohibited trade in certain articles, it has limited the right to trade to persons licensed under Federal laws, and in many ways asserted a greater control than would be possible over other branches of commerce."

[5]Worcester v. Georgia, supra; Willoughby, supra, pp. 379-402, 1327, 1328.

[6]The tax involved in the instant case has also been phrased in terms of a tax on the privilege of engaging in business. See A.R.S. § 42-1308 and Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955).

tions of a taxpayer with the taxing state. In *Spector Motor,* for example, the Supreme Court invalidated a Connecticut privilege tax imposed on an interstate trucking corporation and said at 609:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character. The constitutional infirmity of such a tax persists no matter how fairly it is apportioned to business done within the state."

See also, Alpha Portland Cement Co. v. Massachusetts, supra; Memphis Steam Laundry Cleaners, Inc. v. Stone, supra; Ozark Pipe Line Corp. v. Monier, 266 U.S. 555 (1925).

The United States Supreme Court has repeatedly invalidated a state tax phrased in terms of a privilege for engaging in interstate commerce. This Court recognized this prohibition against such a tax in Combustion Engineering v. Arizona State Tax Commission, 91 Ariz. 253, 371 P.2d 879 (1962). The United States Supreme Court has also struck down state taxes on the privilege of doing foreign commerce. Brown v. Maryland, 12 Wheat. 419 (1827), for example, concerned a Maryland tax imposed on a foreign importer. The Court invalidated the tax on alternative grounds: the Import-Export Clause[7] and the Commerce Clause. Discussing the impact of the Commerce Clause on the state tax, the Court said at 447:

> "Congress has a right, not only to authorize importation, but to authorize the importer to sell . . . . The power claimed by the State [of Maryland] is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."

See also Crew Levick Company v. Pennsylvania, 245 U.S. 292 (1917).[8]

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[7]U. S. Constitution, Article 1, § 10, Clause 2.

[8]Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 75 (1946), cites *Brown* and *Crew Levick* with approval, although the *Richfield* decision was based on the Import-Export Clause.

Although no court before this has ruled on the validity of a state tax which is imposed on the privilege of doing business with the Indians, the principle prohibiting such a tax on interstate and foreign commerce should also apply to this case. Certainly the Indian trader here is no less favored by the Commerce Clause than is the interstate trucker in *Spector Motor* and the foreign importer in *Brown*. From the Commerce Clause emerges a principle forbidding a state tax on the privilege of engaging in an area of trade delegated exclusively to the federal government. Consequently, in my opinion, this privilege tax is invalid when imposed on a federal Indian trader. Arizona has no power to tax the privilege of doing business with the Indians because it is a privilege granted solely by the federal government.

Indeed, this prohibition arising from the Commerce Clause applies with greater force in the area of Indian commerce than in the other two trade areas. First, as opposed to interstate and foreign commerce, doing business with the Indians is a privilege conditionally granted by the federal government, not an individual right. While any person may engage in interstate and foreign commerce in the absence of regulations to the contrary, no one may sell to Indians unless licensed and rigorously regulated by the Commissioner of Indian Affairs.

Secondly, we have here a stronger case against a state privilege tax than in the case of foreign or interstate commerce because Congress has more fully occupied and regulated the area of Indian commerce. The federal government, for example, neither grants nor regulates the privilege of engaging in interstate commerce in the manner it grants and regulates the privilege of engaging in Indian commerce. Under the present law, the Commissioner of Indian Affairs has the exclusive power to regulate the kind, quality and price of the goods sold to the Indians. 25 U.S.C.A. §§ 261-264.[9] Implied prohibitions from the Commerce Clause set certain

[9] § 261 "*Power to appoint traders with Indians.* The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices

(*Footnote continued on following page*)

minimum conditions for engaging in interstate and foreign commerce. For Indian commerce, however, we have not only the implied prohibitions from the Commerce Clause, but a complete set of federal regulations which does everything except expressly prohibit this tax.[10]

Even so, the majority in this case, cites language from Oklahoma Tax Commission v. United States, 319 U.S. 598, 607 (1943), an estate tax case, and concludes: "Congress has not provided nontaxability [of Indian traders] from excises although it could have." As we have seen, the majority persists in treating this as an

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at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.

§ 262 *"Persons permitted to trade with Indians.* Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1909.

§ 263 *"Prohibition of trade by President.* The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264 *"Trading without license; white persons as clerks.* Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500 . . . ."

[10]The set of federal regulations regarding the operation of radio stations also does everything except expressly prohibit such a state tax. In Fisher's Blend Station, Inc. v. Tax Commission of the State of Washington, 297 U.S. 650 (1936), Justice Stone, writing for an unanimous court, invalidated a state occupation tax measured by gross receipts (which is really only another name for a privilege tax) when imposed upon a radio station operating under a federal license. One of the controlling facts was the requirement of the federal license. The act involved in the case, the predecessor of the Federal Communications Act, prohibited "any save licensees to operate broadcasting apparatus." The resemblance of this act to the federal regulation in the instant case, § 261, is apparent.

"exemption" case and in construing strictly against the taxpayer. Consequently, to support its position, the majority uses language from *Oklahoma Tax Commission*,[11] an "exemption" case. But this is a "scope" case; it concerns the ambit of the Arizona tax in relation to the powers delegated to the federal government in the Commerce Clause. Therefore, this Court should interpret favorably to the taxpayer. Alvord v. State Tax Commission, supra.

Moreover, the absence of express Congressional prohibition of this tax should not be interpreted as implied consent. At the time the federal regulations were passed, such a tax had never been proposed. In addition, where the power is exclusive, as it is here, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restriction. Robbins v. Taxing District of Shelby County, 120 U.S. 489 (1886); Phliadelphia & S. Mail Steamship Co. v. Pennsylvania, 122 U.S. 326 (1886); Leisy v. Hardin, 135 U.S. 100 (1889); and In re Rahrer, 140 U.S. 545 (1891). Consequently, the Commerce Clause precludes this tax on appellant, even in the absence of a specific prohibition by Congress.

The majority restates its two basic conclusions at the close of its opinion. The first conclusion regarding no tax exemption for a federal instrumentality is immaterial; appellant specifically abandoned this "instrumentality" theory during oral argument. The second conclusion has two premises: first, this tax imposed by Arizona is not "inconsistent" and, second, it is not "burdensome"

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[11]The majority quotes twice from *Oklahoma Tax Commission*. While some language from that case may superficially appear applicable, it actually has no relevance to the instant case. Not only is *Oklahoma Tax Commission* an "exemption" case, but Oklahoma Indians are anomalous. The United States Supreme Court recognized this in *Oklahoma Tax Commission* at 604. See also Cohen, Federal Indian Law (1956) 1051. Consequently, a case involving Oklahoma Indians does not necessarily apply to this case involving Navajo Indians. The relation between the Navajo Indians and Arizona differs significantly from the relation between the Oklahoma Indians and Oklahoma. See also Williams v. Lee, supra, at 222-223. Arizona has assumed fewer responsibilities than Oklahoma and the Navajo Indians have exercised a greater degree of tribal autonomy than the Oklahoma Indians.

to federal purposes or laws. I will analyze these premises in inverse order.

When determining that this tax does not have a "burdensome effect" on Indian commerce, the majority uses the "local activity" test from California v. Zook, 336 U.S. 725 (1949) and Cooley v. The Board of Wardens, 12 How. 299 (1851). This reasoning suffers from what might be termed a "transplanted category."[12] This is what Walter Wheeler Cook warned against when he wrote:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against."[13]

A test developed for the purpose of protecting the free flow of interstate commerce does not necessarily accomplish the purpose of protecting Indian commerce. The "local activity" test of *Zook* and *Cooley* has relevance when applied to an interstate commerce problem; Congress wanted to protect the free flow of trade between states, but did not intend to regulate local activities. But this "local activity" test has no relevance when applied to this Indian commerce problem. Formerly, Indians were considered "the wards of the nation." United States v. Thomas, 151 U.S. 577 (1894). Recent decisions have described the role of the federal government in relation to Indians as a protective trusteeship. See, e.g., United States v. McGowan, 302 U.S. 535 (1938). Congress, therefore, has the duty of regulating commerce with the Indians, even if this commerce appears to be a "local activity" because it takes place wholly within the boundaries of Arizona. Consequently, it is fallacious to reason that this tax does not constitute a burden on

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[12]For an enlightening discussion of this fallacy, see Hancock, "Fallacy of the Transplanted Category," 37 Can. Bar Rev. 535 (1959).

[13]Cook, Logical and Legal Bases of the Conflict of Laws (1942), p. 159 quoted in Hancock, *op. cit.*, p. 575.

Indian commerce just because it is measured by a "local activity."[14] So much for the majority's "burdensome" reasoning.

And when determining that this tax is not "inconsistent" with federal purposes, the majority gives us an interesting history of federal powers and then concludes, without further explanation, that this tax does not conflict with federal laws. But the Department of the Interior, in a formal opinion by the First Assistant Solicitor, could not have been more clear and more definite in this regard:

> "Question has arisen as to how far Indians and persons trading with Indians are subject to the sales taxes imposed by Arizona law. Since the problem is a general one and the Arizona statutes in question are not dissimilar in substance from the sales tax laws of other States and since the subject has been previously covered only in informal memoranda, I have determined to treat the question in a formal opinion.
>
> * * *
>
> "The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians.
>
> * * *
>
> "Where Congress has exercised its authority it is axiomatic that the field is closed to State action. Sperry Oil and Gas Co. v. Chisholm, 264 U.S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions.
>
> * * *
>
> "Traders on Indian reservations who are non-Indians are,

[14]For the same reasons, we would fallaciously transplant another category if we applied to the instant case the "intrastate transaction" test of International Harvestor Co. v. Department of the Treasury of Indiana, 322 U.S. 340 (1944).

in my opinion, required to take out licenses under the Arizona laws in question to carry on trade with non-Indians on the reservation, and must account to the State authorities for sales taxes on so much of their business as is done with non-Indians. They are not required to account to the State authorities for their transactions with Indians on the reservations, but are, if they do deal with the Indians, required to conform with the licensing provisions in the Federal statutes regulating trade with Indians.

* * *

"The preceding part of this opinion demonstrates that sales to Indians on the reservation are not subject to State taxation and Indian purchasers are not required to pay the additional cost which is added to the price of the article to cover the tax. Such additions to the price of articles by State action are clearly interferences with the authority of the Commissioner of Indian Affairs to regulate the prices at which goods shall be sold to the Indians." 57 Interior Dept. Decisions 124 (May 8, 1940).[15]

An "interference with the authority of the Commissioner of Indian Affairs" is inconsistent with federal purposes and laws. Despite this unequivocal language, the majority opinion audaciously advises the Commissioner of Indian Affairs, when determining whether a trader is a "proper person," to "consider whether he will or has complied with" the imposition of the tax in question. So much for the majority's "inconsistent" reasoning.

The majority opinion refers to 61 Stat. 641, §§ 105 and 109 (commonly referred to as the "Buck Act") as a specific congressional authorization to the states to extend sales taxes to persons residing in or carrying on their business and to transactions occur-

[15]The Arizona statutes permit a seller to "add" the tax to the sale price separately, or to "absorb" it in the specified sale price. Arizona State Tax Commission v. Garrett Corp., 79 Ariz. 389, 291 P.2d 208 (1955). It would obviously be specious reasoning to say that a seller in "absorbing" the tax fails to make his price cover the amount of the tax. In either event, it is ultimately passed on to the purchaser.

ring in "federal areas." Section 110(e) of the Buck Act defines "federal area":

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States . . . ."

This definition does not include Indian reservations. An Indian reservation is land held by the United States for Indian use, not for use by the United States. See Your Food Stores, Inc. v. Village of Espanola, 361 P.2d 950 (N.M. 1961). All the Buck Act purports to do is subject to state taxation persons previously not taxed because the transaction "occurred in whole or in part within a federal area."[16] The basis for not taxing an Indian trader is not the physical location of the trading post, but the fact that such a trader conducts "commerce with the Indian Tribes" within the language and purpose of the Commerce Clause. If the legislation regulating Indian traders was based upon the power of Congress to control entry and operations on the area where the trading post is located, then perhaps the Buck Act might be construed to give congressional consent to state taxation. But state taxation in the instant case conflicts with federal policy based on Commerce Clause regulation, rather than on proprietary or jurisdictional regulation. See 58 Interior Dept. Decisions 562 (December 24, 1943).

The thesis of the majority opinion, reduced to its simplest elements, is: The Arizona tax in question is imposed on all persons within the territorial boundaries of the state for the privilege of engaging in the business of selling at retail. The state has imposed the tax on the seller, and it is not concerned with his manner of sale or choice of buyers. He is not required to collect the tax from the buyer. He may do so by collecting it in addition to the specified

[16] See, e.g. Bowers v. Oklahoma Tax Commission, 51 F. Supp. 652 (D.C. Okla. 1943) (contractors on Fort Sill Military Reservation); Hill v. Joseph, 129 N.Y.S. 2d 348 (1954) (concessionairies on Bedloe's Island); Kiker v. City of Philadelphia, 31 A.2d 289 cert. denied 320 U.S. 741 (1943) (employees of League Island Navy Yard); Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) (employees of naval ordinance plant); City of Springfield v. Kenney, 104 N.E.2d 65 (Ohio App. 1951) (residents of federal housing project).

selling price, or he may "absorb" it in the price to the purchaser.[17] The state has no interest in the source which the seller uses in remitting the tax, although it is calculated on the selling price. Therefore if the seller chooses to sell to Indians on a reservation, this neither relates to the imposition of the tax on the trader, nor does it interfere with or violate any federal constitutional or statutory provision.

Since the trader in this case is a business corporation, not a charitable or philanthropic organization, it would be unrealistic to suppose that the trader would abandon the general business practice of passing a tax on to the consumers in some form. The factor which the majority opinion overlooks or ignores is that in doing so, the trader must adjust his selling prices. In turn, this adjustment of selling prices becomes a factor *created by state fiat* which the Commissioner of Indian Affairs and the trader must take into consideration in determining the prices at which a trader must sell merchandise to reservation Indians. This applies to traders already licensed by the Commissioner, as well as to those making application for the privilege in the future.

The majority maintains this situation does not create an interference with the regulation of commerce with the Indian tribes. I maintain that it does.

LORNA E. LOCKWOOD, Justice

[17] Arizona State Tax Commission v. Garrett Corp., supra.

APPENDIX B

Memorandum Opinion of the Superior Court of the State of Arizona, Maricopa County, September 9, 1963

The parties have stipulated to the facts. The only question is, "May the State of Arizona levy a privilege sales tax upon a licensed Indian Trader with respect to sales made by him to Indians on the Navajo Indian Reservation?"

The Arizona Sales Tax does not impose a sales tax on the *purchaser* nor upon the *sale*, but instead, places the tax on the *seller*, for the privilege of engaging in business, and fixes the gross income from sales as the base for computing the tax. Thus, the incidence of the tax is not on the Indian purchaser, nor on the sale made to him, but on the trader for the privilege of transacting business as a merchant.

The U. S. Supreme Court has held that a state may tax the property of non-Indians located on an Indian reservation on the theory that such taxation does not interfere with the exercise by the Federal Government of its constitutional and statutory authority. *Thomas v. Gay, 169 U.S. 264.* At least two state courts have held that a state may tax the property of Indian traders, including their stock in trade. *Moore vs. Beason, 7 Wyo. 292; 51 Pac 875; Cosier vs. McMillan, 22 Mont. 484; 56 Pac 965; Noble vs. Amaretti, 11 Wyo. 230; 71 Pac 879.* In *Surplus Trading Co. vs. Cook, 281 U.S. 647*, it was stated that Indian Reservations are a part of the state within which they lie, and the laws, civil and criminal, of such state, have the same force therein as elsewhere within her limits, save that they can have only restricted application to *Indian wards*. Private property, within such a reservation is subject to taxation under the laws of the state.

It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned. A tax on the stock in trade is as much interference as a tax on the privilege

of selling. Both are too remote to constitute interference with governmental functions.

Plaintiff makes an analogy between the Indian trader and such instrumentalities of the Federal Government as Post Exchanges, claiming the former is entitled to the same immunities from state taxation. There are, however, important distinctions:

(a) Government officers, under governmental regulations, handle and are responsible for all funds of Exchanges; whereas the Indian trader handles his own funds.

(b) Profits from operation of Post Exchanges, if any, do not go to individuals. They are used to improve the soldiers' mess and for other governmental purposes. The trader retains his profits.

(c) An Indian trader is not an officer of the government and his goods are his own private property, which he may sell indiscriminately to Indians or non-Indians.

(See *Standard Oil Co. vs. Johnson*, 316 U.S. 481, for discussion of nature of Post Exchanges).

The Indian trader is not, in my opinion, an instrumentality of the Federal Government, but is rather a private business entity licensed to carry on a mercantile pursuit on the reservation under rather strict governmental supervision. The court adopts the ratio decidendi set forth in *Cosier vs. McMillan, 22 Mont. 484; 56 Pac 965* and *Noble vs. Amaretti, 11 Wyo. 230; 71 Pac 879.*

There will be an order granting the defendants' motion for summary judgment, and denying the plaintiff's motion for summary judgment. This case has been difficult to decide and the court wishes to commend counsel for both sides in the splendid briefs submitted in support of their respective positions.

DATED THIS 9th DAY OF SEPTEMBER, 1959.

s/ YALE MCFATE
Judge

APPENDIX C

Order of the Supreme Court of Arizona Denying Rehearing

The following action was taken by the Supreme Court of the State of Arizona on January 7, 1964, in regard to the above-entitled cause:

"ORDER: Motion for Rehearing — DENIED. Justices Lockwood and Jennings voted to grant.

ORDER: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

ORDER: Petition of Papago tribe to intervene and to file brief Amicus Curiae — DENIED, as extending the issues. Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173."

SYLVIA HAWKINSON, Clerk
By L. BROOKS, Assistant Clerk

Mandate of the Supreme Court of Arizona

To the Honorable the Superior Court of the State of Arizona in and for the County of Maricopa

GREETING:

Whereas, lately in the Superior Court of the State of Arizona in and for the County of Maricopa, before you in a cause between

WARREN TRADING POST COMPANY, a corporation,

Plaintiff,

v.

THAD M. MOORE, WARREN PETERSON and W. E. STANFORD, as Members of the Arizona State Tax Commission, and THE ARIZONA STATE TAX COMMISSION,

Defendants,

Case No. 101942:

said Superior Court on October 7, 1959 entered the following Summary Judgment:

"IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED, that the defendants, as constituting the members of the Arizona State Tax Commission, and the Arizona State Tax Commission, have summary judgment against plaintiff for transaction privilege taxes assessed by the defendants against the plaintiff for sales of tangible personal property made by plaintiff, as a licensed Indian trader, to Reservation Indians, which sales were made by plaintiff at its Trading Post on the Navajo Indian Reservation within the State of Arizona, between the 1st day of November, 1956, to and including the 31st day of December, 1957, in the total amount of $2,886.49, together with interest thereon at the rate of ½ of 1% per month, or fraction of a month, from the date of this judgment until paid."

as by the inspection of the record of the said Superior Court, which was brought into the Supreme Court of the State of Arizona by virtue of an appeal by plaintiff agreeably to the law in such case made and provided fully and at large appears.

And whereas, in April, in the year of our Lord one thousand nine hundred and sixty-three, the said cause came on to be heard before the said Supreme Court and was submitted for decision after argument of counsel.

On consideration whereof, it was on the fourth day of December in the year of our Lord one thousand nine hundred and sixty-three, ordered by this Court that the judgment of the said Superior Court in this cause, appealed from be, and the same is hereby affirmed.

Whereupon, on December 19, 1963, Appellant filed Motion for Rehearing, on consideration of which the Court on January 7, 1964, ordered that the Motion for Rehearing be denied and further ordered: Decision to be prospective from date of first demand by the State Tax Commission for the payment of tax.

You therefore are hereby commanded that such proceedings be had in said cause, as according to the decision and order of this Court, and as according to right and justice, and to law, ought to be had.

Witness, the Honorable JESSE A, UDALL Chief Justice of the Supreme Court of the State of Arizona, the thirteenth day of January, in the year of our Lord one thousand nine hundred and sixty-four.

SYLVIA HAWKINSON
Clerk of the Supreme Court of the
State of Arizona

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APPENDIX D

Constitutional Provisions, Statutes and Regulations

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264:

§ 261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.

§ 262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.

§ 263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians

of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided*, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further*, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.

61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110:

§ 105

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from

sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 106

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 107

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, c. 1263, § 4, 68 Stat. 1227.

§ 108

The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 109

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 110 .

As used in sections 105-109 of this title —

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State. July 30, 1947, c. 389, § 1, 61 Stat. 641.

Federal Regulations:

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958):

§ 251.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential Prohibition

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe. (R.S. 2132; 25 U.S.C. 263.)

§ 251.3 Forfeiture of Goods

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs. (R.S. 2133, as amended; 25 U.S.C. 264)

§ 251.5 Government employees not to trade with Indians except in certain cases

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided,* That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further,* That employees in Alaska may in each case make such purchases with the approval of the Secretary of the Interior where the amount involved exceeds $250, and with the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States Employees, Indian blood.* Indian employees of the United States Government, of whatever degree

of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative associations, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Government must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ..., ...
(Name) (Title)

swear (or affirm) that I have not exercised any undue influence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U.S.C. 68a, 87a, 441)

§ 251.6 Small Purchases

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

(R. S. 2078; 25 U. S. C. 68)

§ 251.8 Regulating Sale of Arms and Ammunition

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.9 Application for License

Application for license must be made in writing on Form 5-052,[1] setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 5-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

§ 251.10 Bond Requirements

(a) Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of

$10,000, or such less sum as may be designated by the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U. S. C. 6-13). The bond shall be for the same period covered by the license.

(b) The residence of each principal and surety must be distinctly stated, and the signature of each of them attested by two witnesses, and it must appear for whom each witness signs.

(c) Individual sureties must not be bonded officers of the United States, attorneys having business before the Bureau of Indian Affairs, or employees of the principal.

§ 251.11 License Period

No license will be granted for a longer period than 1 year; but at the end of that time, if the Commissioner of Indian Affairs is satisfied that the trade has been conducted properly and that the laws and regulations and terms of the license have been duly observed, a new license may be granted.

§ 251.12 License Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 251.13 Power to Close Unlicensed Stores

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration of the license without applying for renewal; the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 251.14 Trade Limited to Specified Premises

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 251.15 License Applicable for Trading Only by Original Licensee

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 251.16 Trade in Annuities or Gratuities Prohibited

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the cattle belong, except with the written consent of the agent of said tribe.

§ 251.17 Tobacco Sales to Minors

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 251.18 Intoxicating Liquors

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 251.19 Drugs

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 251.21 Gambling

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 251.22 Inspection of Traders' Prices

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at Trader's Risk

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the

collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash Payments Only to Indians

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 251.25 Trade in Antiquities Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 251.26 Infectious Plants

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

§ 252.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians of the Navajo, Zuni, and Hopi Reservations may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 252.2 Presidential Prohibitions

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or any particular articles, into the country belonging to the Navajo, Hopi, and Zuni Indians and to direct that all licenses to trade with such tribes be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe or members of any other tribe residing on the Navajo, Zuni or Hopi Reservations.
(R. S. 2132; 25 U. S. C. 263)

§ 252.3 Forfeiture of Goods

Any person whether Indian or white who shall establish himself as a trader within the exterior boundaries of the Navajo, Hopi, or Zuni Reservations, or introduce goods or trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession and shall moreover be liable to a penalty of $500.
(R. S. 2133, as amended; 25 U. S. C. 264)

§ 252.4 Government Employees Not to Trade with Indians

No person employed by the United States Government shall have any interest or concern in any trade with the Indians, except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office.
(R. S. 2078; 25 U. S. C. 68)

§ 252.5 Purchase in Small Quantities Allowed

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.
(R. S. 2078; 25 U. S. C. 68)

§ 252.6 Application for License

Application for license or renewal of license must be made in writing on a form provided by the Commissioner of Indian Affairs, setting forth the full name and residence of the applicant and three responsible references. If applicant is a firm, the firm name and the name of each member thereof; the place where it is proposed to conduct the trading post; and upon the request of the superintendent, the capital invested or to be invested and of this the amount of capital owned and the amount borrowed, or to be borrowed; the name of the lender of the borrowed capital; the date due, the rate of interest to be paid; indorsers and security; copy of any contract or trade agreement, or agreements, oral or written, with creditors or financing individuals or institutions, including any stipulations whereby financing fees are to be paid, directly or indirectly, tending to restrict the trader as a bargainer in the wholesale markets or otherwise to increase the delivered wholesale costs of merchandise at the trading posts. Application must be accompanied by satisfactory evidence as to the character, experience, and business ability of applicant and his employees and their general fitness to reside on the Indian reservation. All such information shall be considered as confidential. No employee in the Government service shall exert undue influence, direct or indirect, to help any applicant secure a license.

§ 252.7 Records, Reports and Obligations of Traders

(a) Each trader shall keep in a form approved by the Commissioner of Indian Affairs accurate records of his business activities and render annually not later than March 1 a report to the superintendent showing capital investment, increases and withdrawals, whether in the form of cash, merchandise, or other property; the value of buildings and improvements, furnishings and fixtures, miscellaneous assets such as automobiles, trucks, or other property essential to

the business; a complete record of all liabilities, including accounts, bills and notes payable, and the amount of cash received and disbursed, balances, whether on hand, on deposit, or due the store; the accounts, and notes receivable, and the pawns of pledges taken. The names and respective interests of all persons participating in the business shall be furnished.

(b) The price of all articles of merchandise placed on sale shall be plainly and visibly marked by the trader.

§ 252.8 Licensee; Owner of Trading Post

A licensee of a trading post shall be the owner of the business. He shall be responsible to the Commissioner of Indian Affairs for the entire operation of the trading post, including acts of commission or omission of his employees, and for reports required by the Commissioner of Indian Affairs.

§ 252.9 Bond Requirements

Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of $10,000, or such less sum as may be designated by the superintendent or the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U. S. C. 6-13). The bond shall be for the same period covered by the license.

§ 252.10 License Period

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the permit or lease held by the licensee on restricted Indian land. The license period in no event shall exceed 25 years. Licenses for periods not to exceed 10 years may be issued by the area director.

§ 252.11 Application for Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on a form[1] prescribed by him, through the superintendent, at least 3 months prior to expiration of the existing license, and the superintendent must report to the Commissioner of Indian Affairs as to the record the applicant has made as a trader and his fitness to continue under such a license.

§ 252.12 Temporary Permits

No trader shall carry on trade with the Indians without a license, or continue to trade with the Indians after the expiration of the license. A temporary license for 3 months may be issued by the Commissioner of Indian Affairs, or his duly authorized representative, pending consideration of application for renewal of license. In case the trader has neither a temporary permit nor a renewal of license, the Commissioner of Indian Affairs or his duly authorized representative is authorized to close the trading post of such trader. Upon the approval of the tribal council concerned, a trader may be granted the use of not to exceed eight acres of tribal land as a site for a trading post, corrals and other buildings required in connection with the business.

§ 252.13 Trade Confined to Licensed Premises

All trade with Indians shall be confined to the premises specified in the license, except the buying of livestock and livestock products, which shall be covered by special permits issued by the superintendent.

§ 252.14 Subleasing; Livestock Herding Prohibited

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs, and the consent of the tribal council concerned. A license to trade with Indians does not

confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation or in conjunction with Indians.

§ 252.15 Gambling Prohibited

Gambling, by dice, cards, or in any way whatever including any mechanical device is strictly prohibited in any licensed trader's store or on the premises.

§ 252.16 Security

(a) Traders may accept pawns or pledges of personal property for security of accounts due to them by Indians. Traders shall be liable for the market value of all pawns or pledges held by them. The market value shall be settled by agreement between the Indian and the trader at the time of the transaction. In all cases where pawns or pledges are accepted by the trader a written receipt shall be given the Indian showing (1) the date of the transaction, (2) the nature of the pawn or pledge, (3) the amount loaned thereon, and (4) its market value as agreed upon between the Indian and the trader. A pawn or pledge not redeemed within 11 months shall be displayed in a conspicuous place in the trader's store for a period of 30 days together with a notice stating that unless the amount due, which shall be specified, is paid before the expiration of the 30 days, such pawn or pledge will be forfeited. At the expiration of 12 months from the date of the original loan, a pawn or pledge not redeemed shall become the property of the trader, in which event the amount due shall be cancelled on the trader's books. Notice of such cancellation shall be given in writing to the interested Indian.

(b) On the Navajo Reservation the period for the redemption of a pawn or pledge shall be 6 months unless at least 30 days prior to the expiration of such period not less than 25% of the amount due has been paid, in which case the redemption period shall be 8 months; an additional

period of 2 months shall be added to the redemption period for every additional 25% of the amount due that may be paid. The provisions of paragraph (a) of this section with respect to display, forfeiture, and payment within any 30 day period of grace, shall be applicable also to pawns or pledges taken on the Navajo Reservation.

§ 252.17 Credit at Trader's Risk

A trader may extend credit to Indians, but such credit will be at the trader's own risk. All payments to Indians for products or labor must be made in lawful United States money or in credit on the traders' books at the option of the Indian. Receipt must be given Indians for all articles they have sold to traders and on which they have requested book credit. These receipts must show the following information: (a) the date the transaction was made, (b) the amount paid the Indian, and (c) a description of the article or articles sold. All receipts issued by the trader for Indian products must be recorded in the trader's books in such manner that all information contained in the receipt is duplicated. Receipts may be transferred upon order of the initial recipient if it is to his convenience that such a procedure be followed.

§ 252.18 Government Checks Paid in Cash

Traders must pay all Government checks accepted in cash, merchandise or credit to the full value of the check presented. The acceptance of cash, merchandise, or credit for Government checks shall be at the option of the Indian in all cases.

§ 252.19 Premises Kept in Sanitary Condition

The traders shall keep both their premises and places of business in a clean, sanitary, and presentable condition at all times and shall avoid exposure of foodstuffs to infection from the air, dust, insects or handling. It shall be the duty of the health officers of the reservation and their assistants to make periodical inspections, recommend improvements, and

report thereon to the Commissioner of Indian Affairs or his duly authorized representatives.

§ 252.20 Traders' Responsibility

Traders shall be kept responsible through bond for any loss of Indians' property in their possession, including credit on books.

§ 252.21 License Fee

(a) An annual license fee of $50.00 shall be paid in advance by all licensed traders who are not members of the Navajo, Zuni, or Hopi Tribes. The area director shall determine the amount of such license fee to be paid by licensees who are members of the Navajo, Zuni, or Hopi Tribes. No such annual license fee shall exceed $50.00. All fees shall be deposited to the credit of the account "Indian Moneys, Proceeds of Labor, Navajo Agency (or Hopi or United Pueblos Agency)" and may be expended by the administrative official in the enforcement of the regulations in this part.

(b) On the Navajo Reservation, this license fee shall be paid on the basis of a calendar year regardless of any change in ownership of the business covered by the license unless the license be canceled for cause. When a license is issued following the cancellation of a license for cause or when a new business is established after the beginning of a calendar year, the license fee shall be determined on a quarterly basis, but the quarterly fee of $12.50 shall be charged also for a fraction of any quarter of a year. A transfer fee of $5.00 shall be collected whenever an unexpired license is transferred or assigned during a calendar year to a new owner of a trader's business.

(c) Deposits made by a temporary licensee under this part as provided by § 252.12 shall be refunded in the event a license is not issued unless the temporary licensee conducts a trading business during the period of temporary operation in which event the temporary licensee shall be charged a fee

on a quarterly basis for the period during which the business was conducted and the balance of the deposit shall be refunded.

§ 252.22 Grants and Donations Prohibited

No licensed trader shall be permitted to grant or donate any money or goods to the performance of any Indian dance or ceremony.

§ 252.23 Introduction of Livestock Prohibited

The introduction of livestock by traders or others into the Navajo, Hopi, and Zuni Reservations is prohibited except by special permit issued by the superintendent.

§ 252.24 Trade in Antiques Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 252.25 Imitation Indian Crafts Prohibited

It shall be forbidden for any person to introduce or have in his possession for disposition or sale to Indians or others, within the exterior boundaries of the forementioned reservations, any Indian arts and crafts, which are, according to established standards, imitation or spurious. Violators may be punished at the discretion of the superintendent.

CROSS REFERENCE: For Indian arts and crafts standards and certificates of genuineness, see Chapter II of this title.

§ 252.26 Sunday Trading

Traders shall not keep their places of business open on Sundays. However, this shall not be construed as prohibiting traders from accommodating travelers or Indians coming from a distance to trade in case of emergency.

§ 252.27 Purchase of Annuities and Gratuities Goods Prohibited

Traders are forbidden to buy, trade for, or have in their

possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians, may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the livestock belong, except by special permit issued by the superintendent.

§ 252.27a Amusement Companies

All carnival companies, circuses, theatrical companies, all persons, firms or companies conducting or operating portable dance pavilions, mechanical devices such as ferris wheels, carousels, or other devices for carrying passengers, and all persons operating games of skill, shall be considered traders and shall be required to obtain a license and to pay such fees as may be prescribed by the superintendent in charge of the jurisdiction, based on the number and class of devices or units to be operated (not less than $5.00 nor more than $25.00 per unit); and shall post a surety bond in an amount not exceeding $10,000.00 and a personal injury and property damage liability bond of not less than $500.00 nor more than $20,000 as may be required by the superintendent.

§ 252.27b Peddlers

All itinerant peddlers or purveyors of foodstuffs or other merchandise shall be considered traders and shall be required to obtain a license or permit from the superintendent setting forth the class of trade or peddling to be carried on; shall pay such fee as may be prescribed by the superintendent, and shall post such surety bond (not less than $500.00 nor more than $10,000.00) as may be required by the superintendent.

§ 252.27c Fees of Governing Body

The fees prescribed by these regulations shall not be considered as precluding the governing body of any Indian res-

ervation or Pueblo from assessing and collecting such fees, etc., as it may deem appropriate.

§ 252.28 Amendments

The regulations in this part are subject to change and addition with reasonable notice, at the discretion of the Commissioner of Indian Affairs. The trader is subject to revocation of license, and forfeiture in whole or in part of bond in the event of any violation of the regulations in this part.

Arizona Revised Statutes

§ 42-1301

In this article, unless the context otherwise requires:

* * *

2. "Business" includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales.

* * *

6. "Engaging", when used with reference to engaging or continuing in business, includes the exercise of corporate or franchise powers.

* * *

8. "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income.

* * *

11. "Person" or "company" includes individual, firm, partnership, joint adventure, association, corporation, municipal corporation, estate, trust or any other group or combination acting as a unit, and the plural as well as the singular number.

* * *

13. "Sale" means any transfer of title or possession, or both,

exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, and includes:

(a) Any transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(b) The fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property.

14. "Sale at retail" means a sale for any purpose other than for resale in the form of tangible personal property, but "transfer of possession", "lease" and "rental" as used in the definition of "sale" means only such transactions as are found upon investigation to be in lieu of sales as defined without the words "lease or rental."

15. "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched or is in any other manner perceptible to the senses.

§ 42-1305 **Rule Making Power of Commission**

The commission is authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this article.

§ 42-1308

A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. Licensees operating on March 24, 1954, shall be deemed to have complied with the provisions of this section.

* * *

F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days. As amended Laws 1956, Ch. 98, § 1.

§ 42-1309

A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§ 42-1310 through 42-1315.

§ 42-1312

A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from:

1. The sale of stocks and bonds.

2. Professional or personal service occupations, or businesses which involve sales or transfers of tangible personal property only as inconsequential elements thereof.

3. Services rendered in connection with or in addition to the sale of tangible personal property at retail by businesses or occupations other than those to which subdivisions (a)

through (h) of paragraph 2 of § 42-1310 and § 42-1311 are applicable.

Arizona Tax Commission Regulation 2.18.5

Trading Posts on Indian Reservations. A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY, APPELLANT

v.

THE ARIZONA STATE TAX COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

This case involves the right of the State of Arizona to require Indian traders operating trading posts located on the Navajo Indian Reservation to pay for the privilege of doing such business a two percent tax on the gross proceeds of sales made to Indians residing on the reservation. The questions presented are substantial and have not been previously ruled upon by the Court.

Appellant conducts a trading post on a Navajo Indian Reservation under a license granted by the Commissioner of Indian Affairs pursuant to 25 U.S.C. 261–262.[1] The State of Arizona has had, since 1935,

[1] The provisions of these and other pertinent federal statutes and regulations are set forth at pages D1–D22 of the Jurisdictional Statement.

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a Transaction Privilege Tax (Arizona Rev. Stats. 42–1308, 1309, 1312),[2] which requires that all persons engaged in the business of making retail sales of tangible personal property in Arizona shall obtain a privilege license for a fee of one dollar and pay a privilege tax equal to two percent of such sales or the gross income from the business. Licenses are issued only if the applicant has paid the tax and are conditional upon continued compliance. Operation without a license is a misdemeanor punishable by fine and imprisonment (*id.* at 42–1308 B., E.).

Until 1957, this tax was never levied upon the sales of licensed Indian traders to Indians on the reservation (J.S. 7). In 1956, however, the Arizona State Tax Commission adopted Regulation 2.18.5[3] which provides that any person operating a trading post on an Indian reservation is "subject to the tax levied upon retail sales" and that such tax shall be paid "on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation."

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[2] These and other statutes of the State of Arizona are set forth in pertinent part at pages D22–D25 of the Jurisdictional Statement.

[3] The regulation is part of the Combined Privilege Sales and Use Tax Regulations and reads as follows: "*Trading Posts on Indian Reservations.* A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

When the tax was levied upon appellant's retail sales for the period November 1, 1956, through December 31, 1957, appellant brought this action seeking a declaratory judgment that the action of the Tax Commission was unconstitutional and in conflict with the express provisions of federal laws and regulations governing commerce with the Indian tribes (J.S. 8–9). The Superior Court for Maricopa County granted summary judgment for the Tax Commission (J.S. B1–B2) and was affirmed by the Supreme Court of Arizona (J.S. A1–A22). The latter court rejected appellant's contention that "the commerce clause of the federal constitution by its own force creates an area of trade free from interference by the state" and held that "state laws apply to the extent they do not conflict with federal Indian laws" (J.S. A6). The court reviewed the federal statutes on trading with the Indians and found no conflict or preemption of the field (J.S. A7).

The decision of the State Supreme Court upholding the tax levied by the State Commission presents the following questions:

> Whether Article I, Section 8, Clause 3 of the Federal Constitution, which provides that "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," denies to the State of Arizona the power to require persons operating a trading post on an Indian reservation to pay for the privilege of doing such business a tax on the gross proceeds of sales made to Indians on the reservation.

Whether the State's attempt to tax Indian traders selling to Indians on the reservation is invalid because Congress has occupied the field by adoption of a comprehensive system of statutes regulating such commerce.

1. The decision below is erroneous. The Supreme Court of Arizona ruled in this case that the "tax is on the privilege or right to engage in business" (J.S.A2). This Court has held that the States, by the Commerce Clause, "delegated to the United States the exclusive power to tax the privilege to engage in interstate commerce * * *." *Spector Motor Service* v. *O'Connor,* 340 U.S. 602, 608, and cases cited at 609; *Memphis Steam Laundry* v. *Stone,* 342 U.S 389. Accordingly, it is beyond question that the Constitution forbids a State from imposing a tax upon the privilege or right to engage in interstate commerce. Since the Commerce Clause grants Congress the same authority over commerce with the Indian tribes as over commerce among the several States, *Hanley* v. *Kansas City Southern Ry. Co.,* 187 U.S. 617, 619, it similarly prohibits a State from taxing the right to engage in commerce with those tribes.

But, even if the Commerce Clause were not an exclusive delegation of power in this area, Arizona's attempt to tax Indian traders selling to reservation Indians would be invalid because Congress has occupied this field and left no room for the action taken by the State. Beginning in 1876 in the Indian Trading and Intercourse Acts (19 Stat. 200) and continuing until today, Congress has exercised the power

granted over commerce with the Indian tribes to provide a comprehensive system of regulation of those persons who may trade with the Indians, of the goods that they may sell, of the prices to be charged and of a myriad of other details of such trade. Thus, 25 U.S.C. 261 presently provides:

> The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

As the Court stated in *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230, with respect to the effect of the United States Warehouse Act, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Indeed, this is just such a case as that referred to in *Rice*, 331 U.S. at 230, and *Pennsylvania* v. *Nelson*, 350 U.S. 497, 504, where "the federal statutes 'touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'"

The Commissioner of Indian Affairs has explicitly recognized the exclusive nature of his authority over commerce with the tribes. Where he has wished to allow another person to collect fees from the traders, he has issued specific regulations to that effect. Thus, 25 C.F.R. 252.27c provides that "[t]he fees prescribed by these regulations shall not be con-

sidered as precluding the governing body of any Indian reservation or Pueblo from assessing and collecting such fees, etc., as it may deem appropriate." No such exception has been provided for the exaction of taxes by the States.[4]

The Arizona attempt to tax Indian traders also conflicts with the Congressional plan of regulation by the Commissioner of Indian Affairs. By making payment of the tax a condition of doing business in the State, the Arizona statute denies to the Commissioner the "sole authority to appoint traders" which 25 U.S.C. 261 gives him. The Commissioner exercised this exclusive authority by licensing appellant and the State cannot impose its own conditions upon the exercise of the Federally-conferred authority. It is no answer to say, as does the Arizona court (J.S. A8), that the Commissioner should limit his appointment to those persons who will comply or have complied with the State tax laws. *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187. The Commissioner's authority to determine proper persons for trading is not to be so confined by the States.

Recognition of the State's power to tax the privilege of selling to Indians on reservations would raise

[4] We reject as untenable the suggestion of the court below (J.S. A9) that the Buck Act of October 9, 1940, 54 Stat. 1059, 4 U.S.C. 12–18 (reprinted at J.S. D2–D4), provides such an exception. The Interior Department ruled to the contrary shortly after enactment of the Buck Act, 58 I.D. 562, as did the Supreme Court of the State of New Mexico. *Your Food Stores, Inc.* v. *Espanola*, 68 N.M. 527, 361 P. 2d 950. The Buck Act was aimed at confirming the taxing authority of the States over particular geographical areas which the States had ceded to the United States. Federal power over Indian reservations is unrelated to such cessions.

other conflicts with the federal laws. The power to levy a privilege tax on the gross proceeds of sales would give the State the power to affect the prices at which goods are sold to the Indians. As noted above, Section 261 gives the Commissioner of Indian Affairs sole authority over prices.

The Department of the Interior has twice ruled that a tax such as this may not constitutionally be applied to Indian traders selling to Indians on the reservation. In 1940 the Department ruled that the very Arizona tax at issue here could not be imposed upon Indians within a reservation and that persons trading with Indians on Indian reservations are not subject to the tax. 57 I.D. 124. In an opinion approved by Oscar Chapman, then Assistant Secretary, the First Assistant Solicitor stated (*id.* at 125):

> * * * The regulation of trade with Indian tribes is one of the powers expressly delegated to Congress by section 8 of Article I of the United States Constitution. Congress has exercised this power in statutes restricting trade with the Indians and giving exclusive authority to the Commissioner of Indian Affairs to regulate such trade and the prices at which goods shall be sold to the Indians. * * *
>
> * * * Where Congress has exercised its authority it is axiomatic that the field is closed to State action. *Sperry Oil and Gas Co.* v. *Chisholm*, 264 U.S. 488. Therefore, persons selling to or buying from Indians on Indian reservations are not subject to State laws which regulate or tax such transactions. * * *

This ruling was reaffirmed in 1943 by the Solicitor of the Department, 58 I.D. 562, who concluded that

Congress had not intended by enactment of the Buck Act, 4 U.S.C. 12–18, to interfere with the exclusive authority of the Commissioner of Indian Affairs over trade with the Indians on Indian reservations.

2. The decision below has significant impact. Until the action of the Arizona court at issue here, the position of the Department of the Interior expressed in its decisions of 1940 and 1943 has been universally respected by the States. As a consequence, the questions here involved concerning the scope of State authority over commerce with the Indian tribes have not previously been presented to this Court. If the decision below stands, other States are likely to follow Arizona's lead. There is thus the potential threat of general State taxation of traders on all Indian reservations. Appellant points out (J.S. 14) that 21 of the 25 States in which there are Indian reservations have retail sales taxes similar to the Arizona tax here involved. Since the traders, in turn, would find it necessary to pass on such taxes to their Indian customers either directly or indirectly through increased prices, the decision would have a material effect upon the economic status of the tribes which has long been a matter of great federal concern.

A substantial number of Navajos are affected by this decision. That tribe has a population of about 45,600 persons on the reservation in Arizona, with an average annual income of about $1,600. Almost all of their purchases are made at the trading posts operated by some 159 licensed traders. The prices at which these low income Indians make their purchases will

undoubtedly be affected if the State is permitted to impose this tax.

For the foregoing reasons, we submit that probable jurisdiction should be noted.

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No. 115

In the Supreme Court of the United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY,

Appellant

vs.

THE ARIZONA STATE TAX COMMISSION, ET AL,

Appellee

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

BRIEF OF THE PAPAGO TRIBE AS AMICUS CURIAE

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WARREN TRADING POST COMPANY,

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Appellee

ON APPEAL FROM THE SUPREME COURT OF ARIZONA

INTRODUCTION — INTEREST OF THE AMICUS

The Papago Tribe resides in Southern Arizona on Reservations in the Sells, Gila Bend, and San Xavier areas established by Executive Order and Congressional Enactments. 50 Stat. 536 (1937), 25 U.S.C. Sec. 463 (a)-(c).

The Tribe and its members do business with several licensed traders on the Reservations, and the Tribe has recently obtained the approval of the Department of the Interior to impose a regulatory privilege tax upon those traders measured by three per cent (3%) of their gross reservation sales. Resolution 44, Ordinance of the Papago Council, approved November 22, 1963; set forth in Appendix, page A4, post.

The interest of this *amicus curiae* arises because the tax upheld by the decision below conflicts with the Tribe's own tax, and because the decision below may well constitute precedent for additional regulations imposed by the State of Arizona amounting to an assumption of powers heretofore not recognized over internal tribal affairs.

This brief is directed to the question of the affect of the decision on Indian sovereignty.

ARGUMENT

I.

The jurisdiction of the United States over commerce with the Indian tribes is supreme and exclusive.

The decision below (95 Ariz. 110, 387 P.2d 809) characterized the issues raised by Arizona's imposition of the tax as dealing with the question of whether the trader is entitled to an "exemption" from the ambit of the tax. It thus assumes the State's jurisdiction to impose the tax. As pointed out in the dissent (95 Ariz. 110, 120-124, 387 P.2d 809, 817-819), however, the question to be met is whether there is jurisdiction to impose the tax at all, because we are solely involved with on-reservation sales to reservation Indians by a federally licensed Indian trader.

Amicus' position is that the Arizona State Tax Commission has no jurisdiction to impose limitations or conditions on the right to do business on the reservation with reservation Indians. The federal power involved is the Commerce Clause (Article 1, Section. 8, Clause 3) of the United States Constitution, where Congress is given the power "to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes." That power is as complete with relation to the Indian tribes as it is with relation to foreign nations, and is "exclusive and absolute." *Dick vs. United States,* 208 U.S.

340, 356 (1908). As set forth by counsel for the appellant in appellant's opening brief, the same reasoning which precludes state taxation of the privilege of engaging in interstate commerce [*Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *Spector Motor Service v. O'Connor*, 340 U.S. 602, 608 (1951)] or foreign commerce [*Crew Levick Co. v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827)] should apply with at least equal force to the privilege of engaging in Indian commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 193 (1824); *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 619 (1903); *U.S. v. Forty-three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Dick v. United States*, 208 U.S. 340, 356 (1908); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Amicus submits that the tax in question is a regulation or licensing of the appellant's privilege of engaging in Indian commerce. Since the Arizona Supreme Court's interpretation of the Arizona transaction privilege tax governs its meaning here (*N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963)), there can be no doubt that the tax is imposed upon "the privilege or right to engage in business and is not a sales tax." *Arizona State Tax Comm. v. Garrett Corporation*, 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955). Thus, the tax in question conditions the right to engage in business in Arizona; and one who fails to comply with those conditions is guilty of a misdemeanor. *ARS* § 42-1308 (F).

This Court has asserted that the inevitable effect of a privilege tax is to regulate. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943), Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 429-431 (1819). Accordingly, it has long been settled that "only the authority which confers it [the privilege] may impose conditions upon it." *Magoun v. Illinois Trust*

& *Savings Bank*, 170 U.S. 283, 288 (1898). Similarly,

> "The ground upon which this tax is imposed is . . . the right of the state to regulate or if it sees fit, to destroy, inheritances. If it might have not appropriated the whole, it cannot appropriate any part by the law before us." *Chanler v. Kelsey*, 205 U.S. 466, 482 (1907) (Holmes, J., dissenting).

See also *Arenas v. United States*, 140 F. Supp. 606, 608 (S.D. Cal., 1956) aff'd sub. nom. *Kirkwood v. Arenas*, 243 F.2d 863 (C.A. 9th, 1957); and *Restatement, Conflict of Laws*, § 46 (1), "comment e" (1943).

Thus, the authority to license Indian traders is exclusively that of the United States pursuant to the Commerce clause, and the Arizona State Tax Commission, therefore, lacks jurisdiction to enter that field.

II.

The Arizona tax statute, as applied, constitutes an unconstitutional burden upon Indian commerce, a field which has been completely occupied.

Even if the commerce clause did not create in the United States exclusive jurisdiction as to Indian commerce, the Arizona tax upon the privilege of conducting Indian commerce would still be invalid because Congress has occupied this field, leaving no room for state action. See *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 11 (1957) and *Pennsylvania v. Nelson*, 350 U.S. 497, 502-504 (1956). By statute[1] Congress has enacted a wide-ranging system of regulation of the qualifications and licensing of persons who trade with Indians, of the goods which may be sold by them, of the prices which they may charge, and of numerous other incidents to such trade. We have thus, a case where

[1] Act of August 15, 1876, 19 Stat. 176, 200, 25 U.S.C. 261; 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958).

> "The scheme of federal regulations may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

While the question has not yet been judicially determined, the history of the subject shows the scope of the authority vested in the Commissioner of Indian Affairs by 25 U.S.C. 261-264. This was the subject of a 1948 opinion by the Solicitor of the Interior Department, 60 I.D. 176. The Solicitor held there that because Congress had conferred upon the Commissioner the exclusive authority to appoint traders on the Indian reservations and to prescribe the terms and conditions governing their operations, the Navajo Tribe could not do so without the Commissioner's consent in advance. See *United States v. Parton*, 132 F.2d 886, 887 (C.A. 4th, 1943); *Blair, Superintendent v. McAlhaney*, 123 F.2d 142, 143 (C.A. 4th, 1941); 57 I.D. 124; 58 I.D. 562. Thus, the Solicitor's opinion states:

> ". . . a licensed trader is privileged to engage in trade with the Indians under whatever conditions and requirements the Commissioner may prescribe. Without the concurrence of the Commissioner, the Navajo Tribal Council has no authority to impose additional conditions or requirements. *Sperry Oil Co. v. Chisholm*, 264 U.S. 448 (1924); *Blanset v. Cardin*, 256 U.S. 319 (1920)." 60 I.D. 176, at p. 179.

It is submitted that the same considerations should apply whenever such "additional conditions or requirements" are sought to be imposed by a state, and that there is no justification for the Arizona Supreme Court's assertion (95 Ariz. at p. 118, 387 P.2d at p. 815) that in appointing Indian traders, the Commissioner should consider only those persons who will or have complied with

the Arizona transaction privilege tax law.[2] See *Leslie Miller v. Arkansas*, 352 U.S. 187, 188 (1956).

It is apparent, from the statute, from the interpretation given the statute historically and from the complete regulatory provisions enacted under the statute, that it was the intent that the Federal Government pre-empt this field, so that the absence of license tax provisions indicates the Congressional intention that none should exist. The Arizona tax statute thus conflicts with federal pre-emption and is therefore burdensome.

III.

If there is any residual power to regulate Indian commerce, it lies with the tribes, and not the states.

It has been the settled policy of the Federal Government, since the "Cherokee cases" of 1831 and 1832 (*Cherokee Nation v. Georgia*, 5 Pet. 1 (1831); *Worcester v. Georgia*, 6 Pet. 515 (1832)) and the attendant national crisis, that the autonomy of Indian tribes shall be maintained to the fullest extent, save as expressly limited by necessary federal legislation. This policy has been reaffirmed by this court as recently as 1959, in *Williams v. Lee*, 358 U.S. 217. The important history underlying this principle is outlined in Vol. 1, Warren, *The Supreme Court in United States History*, Chap. 19, pp. 729-779. As stated in *Federal Indian Law*, United States Dept. Interior (1958), p. 398:

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[2] 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 25 U.S.C. § 262 provides: "Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians."

"The whole course of judicial decision on the nature of Indian tribal powers is marked by adherence to three fundamental principles: (1) An Indian tribe possessed, in the first instance, all the powers of any sovereign state. (2) Conquest rendered the tribe subject to the legislative power of the United States and, in substance, terminated the external powers of sovereignty of the tribe, i.e., its power to enter into treaties with foreign nations, but did not by itself terminate the internal sovereignty of the tribe, i.e., its powers of local self government. (3) These internal powers were, of course, subject to qualification by treaties and by express legislation of Congress, but, save as thus expressly qualified, many powers of internal sovereignty have remained in the Indian tribes and in their duly constituted organs of government."

At page 396, op. cit., it is stated that:

". . . what is not expressly limited [by federal legislation] often remains within the domain of tribal sovereignty simply because State jurisdiction is federally excluded, and governmental authority must be found somewhere. That is a principle to be applied generally in order that there shall be no general failure of governmental control. *Phillips v. Payne,* 92 U.S. 130 (1876)."

"The acts of Congress which appear to limit the powers of an Indian tribe are not to be unduly extended by doubtful inference."

To the same effect see *In Re Mayfield,* 141 U.S. 107, 115, 116 (1891); *Ex Parte Crowdog,* 109 U.S. 556, 568-572 (1883); 55 I.D. 14, 24-26. See also *Federal Indian Law,* op. cit., pp. 435-439.

As recognized in such cases as *Morris v. Hitchcock,* 194 U.S. 384 (1904), and *Buster and Jones v. Wright,* 135 F. 947, 950-952 (C.A. 8th, 1905), the Indian tribes possess inherent power to impose conditions on those who would trade with them upon their reservation, with the

approval of the Commissioner of Indian Affairs, and to enact similar police power-like regulations. It follows that the tribal sovereignty over these internal governmental functions remains undiminished in the absence of explicit and duly enacted federal regulations, and that it is the tribal sovereignty, and not that of the states, which takes up wherever the regulations of the United States may cease.

Whether these principles of Indian sovereignty were considered and rejected by the court below, or not taken into account at all, they stand seriously threatened by the decision below. At the present time, the Papago Tribe has imposed a three per cent (3%) transaction privilege tax (Ordinances 43-44, Appendix, post); if the decision below is affirmed the State of Arizona will also have a three per cent (3%) transaction privilege tax. The resultant six per cent (6%) will be measured by the gross proceeds from sales on the Papago Reservation which ultimately would be passed on to the Indian consumers. If the Commissioner of Indian Affairs allows a concomitant price increase by the trader, the burden obviously falls upon the Papagos. If the Commissioner of Indian Affairs refuses to allow such an increase, the burden then falls upon the traders.[3] The ultimate effect of permitting the state's imposition of taxation will undoubtedly result in the repealing of the Papagos' own tax in order to lessen the burden upon the individual Indian consumer. The tax would thus become a factor, "created by state fiat,"[4] which will necessarily have to be considered by both the Com-

[3] In which case, however, as pointed out by counsel for the Appellant, the tax would be discriminatory since the trader would then be the only licensee not allowed to pass the tax on to his customers. *Arizona State Tax Commission v. Garrett Corporation*, 79 Ariz. 389, 392-393, 291 P.2d 208, 210 (1955).

[4] 95 Ariz. 110, 130, 387 P.2d 809, 823 (Dissenting opinion by Justice Lockwood).

missioner of Indian Affairs and the Papago Tribal Council. Recognition of this state power would be in complete derogation of the principles of federal supremacy and Indian autonomy.

IV.

Where Congress has consented to state action in an otherwise federal area, the states must comply with the terms of that consent.

There can be little doubt that the license tax in question, if upheld here, will be borne by the Indians. The majority opinion below implicitly admits that the tax will and should be so borne by the Indians.[5] Arizona has thus, in effect, placed the "cart before the horse." At no time has the State seen fit to provide police services, education facilities, or any of the standard State functions, for the reservation Indians in Arizona. Nevertheless, the State now seeks the benefit of taxing those Indians upon their reservation.

Hence, the issue becomes similar to the jurisdictional issue in *Williams v. Lee*, 358 U.S. 217, 222 (1959), where the Court said:

> "In a general statute Congress did express its willingness to have any state assume jurisdiction over reservation Indians if the State Legislature or the people vote affirmatively to accept such responsibility. Act of August 15, 1953 c. 505 §§ 6, 7, 67 Stat. 590 . . ."

The cited enactment paves the way for the removal of legal impediments to the cession of federal jurisdiction over the Indian tribes to those states which, by due process, are willing to accept the ceded jurisdiction and at-

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[5] ". . . There is no suggestion arising out of the stipulated facts that the Indians are less able to pay this tax than other residents of Arizona of a like or similar economic status." 95 Ariz. 110, 114, 387 P.2d 809, 812.

tendant responsibility. The purpose of this legislation is to secure the eventual assimilation of the Indian wards into complete citizenship and society with non-Indian Americans. See *U.S. Code Congr. & Admin. News,* Vol. 2, 83rd Congress, 1st Session, 1953, pp. 2409-2414. The comments on this point by the Court in *William v. Lee,* supra, are as appropriate here as they were then:

> "To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable. See H.R. Rep. No. 848, 83rd Cong. 1st Sess. 3, 7 (1953); Secretary of Interior, Annual Report (1955), 247-248; id. (1956), 215-216; id. (1957), 253-254.
>
> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the Tribal Courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Williams v. Lee,* 358 U.S. 217, 222-223 (1959).

Arizona has still not commenced any steps toward undertaking jurisdiction of Indian matters. It is submitted that the State of Arizona should not be allowed to impose a tax to be borne by reservation Indians unless the State, in turn, is willing to accept a measure of responsibility with respect to those Indians.

The power to tax should be co-extensive, to some reasonable extent, with the obligation to provide governmental protections and benefits. *Wisconsin v. J. C. Penney Co.,* 311 U.S. 435, 444 (1940); *State Tax Commission of Utah v. Aldrich,* 316 U.S. 174, 180 (1942). Thus:

> "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by practical

operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940).

If the decision at bar is affirmed, however, the necessary implication is that the state need not comply with the terms of the Congressional consent to act in this area by accepting the responsibility of that jurisdiction in order to receive its benefits. Cf. *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408, 412-427 (1946); and the "McCarran Act," Act of March 9, 1945, c. 20, 59 Stat. 33, 15 U.S.C. 1011-1015.

CONCLUSION

The power to regulate commerce with the Indian tribes is an area exclusively delegated to the United States and exclusively occupied by the existing scheme of federal regulation of such commerce. The State of Arizona therefore lacks the right and the power to enter that field by imposing its own conditions to the carrying on of such commerce. While Congress may consent to state action in a field in which it is otherwise supreme, no state can undertake such action without first complying with the terms of the consent.

The Papago Tribe's interest as *Amicus Curiae* is principally to show the effect of the decision below on Indian sovereignty. Historically, judicial decisions on the nature of Indian tribal powers evolved a policy of United States maintenance of the inherent sovereignty of the Indian tribes. Wherever that sovereignty is not limited by federal regulation, the authority to act remains with the tribes and not with the states. If this is not so, and if the states may rightfully burden Indian commerce

with conditions in addition to those properly imposed by the Congress and the Indians themselves, then that commerce has been greatly threatened. The Commissioner of Indian Affairs would lose his heretofore absolute control over Indian traders, since he would not be able to prevent state imposition of additional conditions upon such traders. The Tribe's inherent authority would likewise be undermined, since the state regulations would be a factor which the Indians would necessarily have to take into account in enacting their own regulations.

The Papago transaction privilege tax effectively illustrates that state involvement in control and regulation of Indian commerce conflicts directly with the intention of the framers of our Constitution to reserve the field of Indian commerce for the Congress of the United States.

For these reasons, the decision appealed from must be reversed.

Respectfully submitted,

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APPENDIX

RESOLUTION 43, ORDINANCE OF THE PAPAGO TRIBAL COUNCIL, APPROVED ON JULY 22, 1963.

WHEREAS, the State of Arizona has no jurisdiction to impose a sales tax (transaction privilege tax) on sales between Traders located on the Papago Indian Reservation and Indians, and

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the welfare of the Tribe, and

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three per cent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to make this tax applicable in all instances where the previous sales tax imposed by the State of Arizona applied. The *Arizona*

Revised Statutes § *42-1301* - § *42-1347* shall be used as a reference in determining the applicability of the sales tax in question on the Papago Reservation. The Arizona Revised Statutes are used solely for the purpose of illustration and reference and not adopted as such.

Section 3. Each of the Traders shall withhold from the total tax collected three per cent (3%) for the purpose of remitting said three per cent (3%) to the State of Arizona in compliance with the Arizona Revised Statutes covering transaction privilege taxes.

Section 4. It is the intention of this ordinance to comply with the law of the State of Arizona where applicable. Therefore, the three per cent (3%) that will be sent to the State of Arizona represents that proportion of non-Indian business that is transacted with the Traders on the reservation.

Section 5. It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 6. The effective date of this ordinance is July 1, 1963.

Section 7. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 8. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 9. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules

and regulations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 10. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 12th day of July, 1963 duly enacted by a vote of 17 for and 0 against by the Papago Council, pursuant to authority vested in it set by the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of Indians on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 894). Said ordinance is effective as of July 1, 1963, after its approval of the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6, Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL

/s/ Eugene Johnson
EUGENE JOHNSON,
Tribal Chairman

ATTEST:

/s/ Mary Jane Vasquez
MARY JANE VASQUEZ,
Treasurer

APPROVED:

July 22, 1963

/s/ Martin J. Steinwand, Acting Superintendent
THOMAS H. ST. CLAIR, Superintendent

RESOLUTION 44, ORDINANCE OF THE PAPAGO TRIBAL COUNCIL, APPROVED ON NOVEMBER 22, 1963.

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the welfare of the Tribe, and,

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three per cent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 3. The effective date of this ordinance is October, 1963.

Section 4. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 5. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 6. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 7. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 11th day of October, 1963, duly enacted by a vote of 15 for and 0 against by the Papago Council, pursuant to authority vested in it set by the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of Indians on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984). Said ordinance is effective as of October, 1963, after its approval of the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6 Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL
/s/ Eugene Johnson
Tribal Chairman

ATTEST:
/s/ Claudina R. Cherviz
Secretary
APPROVED:
November 22, 1963
/s/ Thomas H. St. Clair
Superintendent

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No. 115

In The
Supreme Court of the United States
OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, a corporation,
Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE APPELLANT

EDWARD JACOBSON
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No. 115

In The
Supreme Court of the United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, a corporation,
Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Arizona (R. 21-44) is reported at 95 Ariz. 110, 387 P.2d 809 (1963). The Superior Court's opinion (R. 19-21) is not reported.

JURISDICTION

On August 26, 1958, Appellant Warren Trading Post Company (Trading Post) filed a complaint for declaratory judgment in

the Superior Court of Arizona in and for the County of Maricopa (R. 1-6) pursuant to Arizona Revised Statutes §§ 12-1831 et seq. (the Uniform Declaratory Judgments Act) and Arizona Revised Statutes § 41-1007, (the declaratory judgment remedy section of the Arizona Administrative Procedure Act).

The action resulted from a corrected assessment of Arizona Transaction Privilege Taxes levied upon Trading Post by the Arizona State Tax Commission (Commission) pursuant to Arizona Revised Statutes § 42-1312.A and Regulation 2.18.5 of the Commission's Combined Privilege Sales and Use Tax Regulations.

The declaratory judgment action was brought in order to secure a declaration that the statute and regulation, as construed and applied by the Commission, were invalid as a violation of Article I, Section 8, Clause 3 of the United States Constitution.

On October 7, 1959, the Superior Court entered summary judgment adverse to Trading Post (R. 10-11).

On December 4, 1959, Trading Post filed notice of appeal to the Supreme Court of Arizona (R. 14-15).

On December 4, 1963, the Arizona Supreme Court affirmed the lower court and rendered a written opinion (R. 21-44).

On January 7, 1964, the Arizona Supreme Court denied rehearing, reflected in a minute entry of the same date (R. 48).

On January 13, 1964, the Supreme Court of Arizona issued its Mandate to the Superior Court (R. 49) containing the judgment enforcing the Arizona Supreme Court's decision and opinion entered December 4, 1963. 17 Arizona Revised Statutes, Supreme Court Rule 14(a).

On April 1, 1964, in the Supreme Court of Arizona, Trading Post filed notice of appeal from the Mandate to the Supreme Court of the United States (R. 51-54).

On May 23, 1964, appellant filed with the Supreme Court of the United States its Jurisdictional Statement, the Proof of Service, a Certified Copy of the Transcript of Record, the docket fee and counsel's Entry of Appearance.

On August 20, 1964, counsel for appellees (by letter to the Honorable John F. Davis, Clerk of the United States Supreme Court) indicated his intention not to file a Motion to Dismiss.

On October 12, 1964, the United States Supreme Court noted probable jurisdiction and placed this case on the summary calendar (R. 54).

The jurisdiction of the Supreme Court to review this judgment by appeal is conferred by 28 U.S.C. § 1257(2).

QUESTION PRESENTED.

The Supreme Court of Arizona has construed Arizona Revised Statutes §§ 42-1308 and 42-1312.A and Commission Regulation 2.18.5 as requiring a license for and authorizing a tax upon the privilege of making retail sales of tangible personal property to reservation Indians living upon the reservation, by an Indian Trader licensed under 25 U.S.C. §§ 261-264, whose trading post is located on the Navajo Indian Reservation in the State of Arizona.

The basic question presented is:

> Whether Arizona Revised Statutes §§ 42-1308 and 42-1312.A and Regulation 2.18.5 as so construed are invalid as being repugnant to and in violation of that portion of Article I, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . .To regulate Commerce . . . with the Indian Tribes;"[1]

STATUTES INVOLVED

The following constitutional provisions, statutes, regulations and ordinances are applicable and are printed in full as Appendix A:

United States Constitution

Article I, § 8, cl. 3

---

[1]The Stipulation of Facts before the Superior Court did not concern (1) off-reservation sales to Indians or non-Indians or (2) on-reservation sales to non-Indians. That Stipulation confined this case solely to a consideration of on-reservation sales to Indians (R-18).

United States Statutes

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264

61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110 (Buck Act)

United States Regulations

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958)

Arizona Enabling Act, § 20, Second, 36 Stat. 569

Arizona Constitution, Article XX, Fourth and Fifth

Arizona Revised Statutes

§§ 42-1301.2, .6, .8, .11, .13, .14 and .15; 42-1305; 42-1308.A and F; 42-1309.A; 42-1312.A

Arizona State Tax Commission, Combined Privilege Sales and Use Tax Regulation 2.18.5

STATEMENT

Arizona has had a Transaction Privilege Tax since the spring of 1935. § 1, Art. 2, Ch. 77, Session Laws of Arizona (1935). Among other things, it licenses and taxes the privilege of engaging in the business of making retail sales of tangible personal property in Arizona.

During all of this period, and before, the Congress of the United States had vested in the Commissioner of Indian Affairs the sole power and authority to license and appoint traders to the Indian Tribes and to make rules and regulations governing their activities, including specifying the kind and quantity of goods they might sell and the prices at which such goods could be sold to the Indians. 19 Stat. 200 (1876), 25 U.S.C. §§ 261-262. And, pursuant to his authority, the Commissioner of Indian Affairs has made and issued rules and regulations to

govern the conduct and affairs of the Indian Traders. 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). Trading without such a license subjects a person to serious penalties. 22 Stat. 179 (1882), 25 U.S.C. § 264.

In the spring of 1940 the First Assistant Solicitor of the Department of Interior (by formal written opinion) specifically held licensed traders' sales to Indians not to be subject to the Arizona Transaction Privilege Tax. 57 I.D. 124 (1940). Three years later this opinion (again formally) was reaffirmed. 58 I.D. 562 (1943). To date, there has been no change in the position of the Department of Interior.

Appellant Trading Post is a corporation organized and existing under the laws of Arizona (R. 2).[2] It is licensed by the United States Commissioner of Indian Affairs to conduct a trading post at Kayenta on the Navajo Indian Reservation in Navajo County, Arizona, on lands leased by it from the Navajo Indian Tribe (R. 2).

On February 25, 1958, the Commission made a corrected assessment of Arizona Transaction Privilege Taxes against Trading Post under Arizona Revised Statutes § 42-1312.A and Commission Regulation 2.18.5 (R. 2-3). This $2,886.49 assessment was levied upon Trading Post's privilege of making retail sales of tangible personal property to reservation Indians from its store on the reservation during the period November 1, 1956 to December 31, 1957 (R. 2-3). But for one prior attempt in 1957, later cancelled, this was the first such assessment the Commission had made upon a licensed Indian Trader since the inception of the Arizona Transaction Privilege Tax in 1935 (R. 33; Original Transcript of Record 166).

On August 26, 1958, Trading Post brought a declaratory judgment action in the Supreme Court of Arizona in and for the County of Maricopa (R. 1-6). The Superior Court held against

[2]Fact Stipulation No. 3 provides that all facts alleged in Trading Post's complaint are admitted, except for two which are not pertinent to this Statement of the Case (R. 18).

Trading Post, basing its opinion largely upon the following reasoning:

> "It would seem that in principle there is little distinction between taxing *stock in trade devoted to sale to Indians* [the Court having previously cited *Thomas v. Gay*, 169 U.S. 264 in support of that proposition] and taxing the *privilege of selling such stock*, insofar as the rules against non-interference with governmental functions are concerned." (Emphasis the court's.) (R. 20).

The Superior Court saw no difference at law between the state's right to levy a personal property tax upon the personal property of an Indian Trader, and a state's right to levy a privilege tax on the privilege of engaging in commerce with the Indian Tribes.

Trading Post then appealed to the Arizona Supreme Court (R. 14-15). The majority opinion of that Court affirmed the opinion of the trial court, while the dissent adopted and presented Trading Post's position in full (R. 22-44).

The majority opinion's conclusion is that the tax is neither burdensome on nor inconsistent with federal purposes or laws (R. 30).

The dissent is based on the proposition that any privilege tax upon the privilege of engaging in commerce with the Indian Tribes is prohibited by Article I, Section 8, Clause 3 of the United States Constitution, since Indian commerce, like interstate and foreign commerce, is an area which has been reserved exclusively for (and actually occupied by) federal regulation (R. 31, 34-37).

SUMMARY OF ARGUMENT

I INTRODUCTION:

It is appellant's position that Arizona may not license and tax the privilege of engaging in Indian commerce for two principal reasons: First, just as with interstate and foreign commerce, the national character of Indian commerce requires that it be regulated only by Congress; and, second, Indian commerce is closed to state regulation because Congress already has occupied the field with a comprehensive system of federal law.

II THE QUESTION IS ONE OF FIRST IMPRESSION SINCE, UNTIL RECENTLY, THE STATES HAVE NOT ATTEMPTED TO TAX THE PRIVILEGE OF ENGAGING IN INDIAN COMMERCE:

The question is one of first impression under Article I, Section 8, Clause 3, the Commerce Clause of the United States Constitution. It arises from Arizona's attempt to license and tax Indian Traders for the privilege of making sales on Indian reservations to reservation Indians.

Until Arizona's recent assessment giving rise to this case, all of the states refrained from taxing Indian commerce, thus abiding by federal law as interpreted by the Department of Interior.

III THE COMMERCE CLAUSE SHOULD BE HELD TO PROHIBIT A STATE PRIVILEGE TAX UPON INDIAN COMMERCE FOR THE SAME REASON IT HAS LONG BEEN HELD TO PROHIBIT SUCH A TAX UPON INTERSTATE AND FOREIGN COMMERCE: THE NATIONAL CHARACTER OF ALL THREE COMMERCIAL FIELDS REQUIRES THAT THEY BE REGULATED SOLELY BY CONGRESS:

A. Sales made on Indian Reservations to Reservation Indians constitute "Commerce . . . with the Indian Tribes":

By Stipulation (R. 18), appellant's claim for tax shelter is limited to those of its sales which are made on the reservation to reservation Indians. The Constitutional phrase "Commerce with the Indian Tribes" includes commerce with individual members of those tribes. *United States v. Holliday*, 3 Wall. 407, 417 (1866). Any narrower interpretation would frustrate the purposes of the Commerce Clause.

B. The Arizona Tax is a Privilege Tax:

Arizona's tax is self-described as a "privilege tax" (Arizona Revised Statutes § 42-1308.A) and repeatedly has been characterized as such by the Arizona Supreme Court. *Warren Trading Post Company v. Moore*, 95 Ariz. 110, 113, 387 P.2d 809, 811, 812 (1963); *State Tax Commission v. Quebedeaux Chevrolet*, 71 Ariz. 280, 284, 226 P.2d 549, 552 (1951). It is not in lieu of any other tax. Arizona Revised Statutes, Title 42, Taxation. Therefore, the label "privilege tax" is entitled to great weight. Indeed, it may be conclusive.

C. A state may not tax the privilege of engaging in interstate or foreign commerce:

While a state is not precluded from levying a privilege tax upon certain local activities incident to commerce among the states, *Norton Co. v. Department of Revenue*, 340 U.S. 534 (1951); *General Motors Corporation v. Washington*, 32 LW 4482, ... U.S. ...., 12 L.ed 2d 430 (1964), it is "beyond dispute that a state may not lay a tax on the privilege of engaging in interstate commerce. . . ." *Portland Cement v. Minnesota*, 358 U.S. 450, 458 (1959). See *General Motors Corporation v. Washington, supra; Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951).

It is equally well settled that a state may not lay a tax upon the privilege of engaging in foreign commerce. *Crew Levick Company v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827).

The purposes and objects to be achieved in these areas concern the nation as a whole. Being national in character they can be attained only by federal control. *Cooley v. Board of Wardens*, 12 How. 299, 319 (1851); *Brown v. Maryland, supra; M'Culloch v. Maryland*, 4 Wheat. 316 (1819). They would be impaired or destroyed if individually regulated by each of the fifty states.

D. The rule prohibiting state privilege taxes upon interstate and foreign commerce should apply with equal force to Indian commerce:

This Court previously has recognized that Congress' reserved power over Indian commerce is equal to its power over interstate and foreign commerce. *Hanley v. Kansas City Southern Ry. Co.*, 187 U.S. 617, 619 (1903); *United States v. 43 Gallons of Whiskey (United States v. Lariviere)*, 23 Wall. 192, 194 (1876); *Dick v. United States*, 208 U.S. 340, 356 (1908).

The need for Congressional power in all three commercial

fields is occasioned by the national objects and purposes to be achieved in each case.

The optimum economic growth of the nation is a principal goal of federal regulation of interstate and foreign commerce. Its counterpart in the field of Indian commerce is the optimum economic development of the tribes in preparation for final assimilation into our society. This goal cannot be achieved by the attempted separate and uncoordinated regulation of Indian commerce by the twenty-five states containing Indian reservations.

IV. INDIAN COMMERCE IS CLOSED TO STATE REGULATION BECAUSE CONGRESS HAS PREEMPTED THE FIELD WITH A COMPREHENSIVE SYSTEM OF FEDERAL LAW:

A. Congress has occupied the field:

Even if the field of Indian commerce were otherwise open to concurrent state regulation (which appellant denies), it has been preempted by a comprehensive system of federal law. This system of law governs every phase of such commerce and vests in the Commissioner of Indian Affairs the sole authority to regulate it. 19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264; 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958). The application of the Arizona privilege tax to Indian commerce is inconsistent with and contradictory to the provisions of the federal law in the field of Indian commerce and the objects and purposes to be attained thereby.

B. The tests for total occupation of the field are met:

The degree of Congressional occupation of the field of Indian commerce meets each of this Court's tests for total preemption of that field, thus precluding any state participation

therein. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Pennsylvania v. Nelson*, 350 U.S. 497, 504 (1956).

C. The Papago Tax illustrates the need to prohibit the states from attempting to regulate Indian commerce:

Appellant's motion for rehearing (R. 44-46) before the Arizona Supreme Court in this case apprised that Court that subsequent to oral argument the Papago Tribal Council enacted a Privilege Tax upon (among others) Indian Traders doing business on the Papago Reservation. Ordinances Nos. 43,44 of the Papago Council; Approval Letters of the Department of Interior (Appendix B).

The joint operation of the Arizona and Papago privilege taxes upon the same Indian Traders for the privilege of conducting the same commerce will discourage qualified persons from being traders on the Papago Reservation, or discourage commerce among the Papagos, or necessitate the repeal of the Papago tax to lessen the commercial burden. The problems incident to such concurrent taxation illustrate the reason that the Constitution reserved to Congress the regulation of Indian commerce.

V. ONLY BY EXPRESS CONGRESSIONAL GRANT MAY THE STATES DIMINISH THE RIGHT OF INDIANS TO GOVERN THEMSELVES. THE FIELD OF INDIAN COMMERCE HAS NOT BEEN THE SUBJECT OF SUCH A GRANT:

Because of the considerable burdens which accompany the power, Arizona has failed to accept, and instead expressly has disclaimed jurisdiction over reservation Indians even in those areas (civil and criminal court jurisdiction) which Congress is willing to grant to the states. *Williams v. Lee*, 358 U.S. 217, 222-223 (1959); Act of Aug. 15, 1953, c. 505 § 6, 7, 67

Stat. 590; Arizona Enabling Act § 20, 36 Stat. 569; Art. XX, Fourth, Arizona Constitution.

Indian commerce has not been the subject of a Congressional grant of power to the states. Without such a specific Congressional grant, no power over Indian commerce can be presumed for such would not only interfere with Indian self-government (as demonstrated by the Papago tax) but would impair the right to regulate such commerce reserved to Congress by the Constitution. *Williams v. Lee, supra; Organized Village of Kake v. Egan,* 369 U.S. 60, 75 (1962).

CONCLUSION:

For the foregoing reasons it is respectfully submitted that Arizona's requirement of a license and a tax upon Indian traders for the privilege of making sales on Indian reservations to reservation Indians violates the Commerce Clause of the Constitution. Accordingly, the judgment of the Arizona Supreme Court should be reversed.

ARGUMENT

I INTRODUCTION:

In support of its position that Arizona may not license or tax the privilege of engaging in Indian commerce, appellant will show that: the sales transactions in question constitute "Commerce with the Indian Tribes" as contemplated by Article I, Section 8, Clause 3 of the United States Constitution; the Arizona tax is a privilege tax; the same considerations which prohibit the imposition of a privilege tax upon interstate and foreign commerce apply equally to Indian commerce; the field of Indian commerce has been occupied fully by federal regulation, thus precluding concurrent regulation by the states; the recent Papago Tribal privilege tax illustrates the conflicts which result from concurrent regulation; and, finally, regulation of Indian commerce has not been the subject of a specific grant by Congress to the states — the only method by which the states could obtain such power.

II THE QUESTION IS ONE OF FIRST IMPRESSION SINCE, UNTIL RECENTLY, THE STATES HAVE NOT ATTEMPTED TO TAX THE PRIVILEGE OF ENGAGING IN INDIAN COMMERCE:

Arizona's transaction privilege tax has been in substantially its present form since 1935. Ch 77, Session Laws of the Regular Session of the Twelfth Legislature of the State of Arizona, 1935. Of the twenty-five states, including Arizona, which contain Indian reservations[1], all but four[2] have a privilege or similar tax measured by gross proceeds of sales. Most of these taxes have been in effect since the depression years of

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[1]These states are Alaska, Arizona, California, Colorado, Florida, Idaho, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma Oregon, South Dakota, Utah, Washington, Wisconsin and Wyoming. *United States Indian Population and Land*, 1962, U.S. Dep't of Interior, Bureau of Indian Affairs.

[2]Idaho, Minnesota, Nebraska and Oregon. 1 C.C.H. Sales Tax Reporter, par. 301, pp. 601-07.

the middle 1930's. 1 C.C.H. Sales Tax Reporter, par. 125, p. 511. In view of the number of interstate and foreign commerce privilege tax cases which have reached this Court in the last nineteen or twenty years,[3] it seems appropriate to consider why this is the first Indian commerce privilege tax case to reach this Court.

It is submitted that the Act of Congress vesting in the Commissioner of Indian Affairs the sole authority to regulate Indian commerce, as well as two formal opinions of the United States Department of Interior dealing specifically with the rights of the states to levy such taxes, have had their effect upon the states. See 19 Stat. 200 (1876), 25 U.S.C. § 261; 57 I.D. 124 (1940); 58 I.D. 562 (1943).[4] The position of the Department of Interior is reflected in a portion of the oft-quoted summary of its 1940 opinion (57 I.D. 124, 129):

> "1. Persons trading with the Indians on Indian reservations are not subject to the Arizona sales tax laws. However, where such traders are non-Indians, they are subject to the sales tax laws on so much of their business as is carried on with other non-Indians. Traders off an Indian reservation are subject to the State sales tax laws whether or not they are Indians or dealing with Indians."

And, in 1948, the Department of Interior expressed the opinion that the tribes themselves are prohibited from placing conditions and restrictions upon Indian commerce, absent specific federal consent. 60 I.D. 176 (1948).

Until recently, all of the states have refrained from taxing the privilege of engaging in Indian commerce. Some states have acknowledged officially their lack of jurisdiction in this

[3] For example, see cases collected in *Portland Cement v. Minnesota*, 358 U.S. 450 (1959).

[4] These opinions are cited with approval in Cohen, *Handbook of Federal Indian Law*, United States Department of Interior (1945), pp. 263-264 and *Federal Indian Law*, United States Department of Interior (1958), pp. 867-873.

field. Ch. 670, Laws of 1959, as amended by ch. 826, Laws of 1961, effective July 1, 1961, North Carolina Statutes (4 C.C.H. State Sales Tax Reporter, par. 58-125b); *Neah Bay Fish Co. vs. Krummel,* 101 P.2d 600 (Wash. 1940); Opinion 54-40 of the Attorney General of Arizona, dated March 4, 1954.

Since the 1958 reversal of Arizona's position (reflected in the assessment made upon the appellant herein and culminating in this appeal), however, both California and New Mexico have asserted the right to tax the privilege of engaging in Indian commerce.[5] The other states having sales taxes and Indian reservations soon can be expected to follow suit. It is clear the question is ripe for settlement by this Court.

III THE COMMERCE CLAUSE SHOULD BE HELD TO PROHIBIT A STATE PRIVILEGE TAX UPON INDIAN COMMERCE FOR THE SAME REASON IT HAS LONG BEEN HELD TO PROHIBIT SUCH A TAX UPON INTERSTATE AND FOREIGN COMMERCE: THE NATIONAL CHARACTER OF ALL THREE COMMERCIAL FIELDS REQUIRES THAT THEY BE REGULATED SOLELY BY CONGRESS:

A. Sales made on Indian Reservations to Reservation Indians constitute "Commerce . . . with the Indian Tribes":

As a necessary predicate to appellant's position that a state may not tax the privilege of engaging in Indian commerce, it must be established that the type of sale here in question constitutes such commerce. Appellant's claim for tax shelter is limited by Stipulation (R. 18) to those of its sales which are

[5]Opinion 58/209 of the Attorney General of California, issued December 31, 1958, reversing opinion NS 799 in effect since January 13, 1958; *Paul E. Brink, dba Brink Trading Co. v. Bureau of Revenue, State of New Mexico,* No. 7670 pending in the Supreme Court of the State of New Mexico, on appeal from the District Court of Santa Fe County, New Mexico, Cause No. 32849.

made on the reservation to reservation Indians. This position is consistent with the Interior Department's ruling. 57 I.D. 124 (1940).

Indian commerce is not confined to commerce with tribal governments any more than interstate or foreign commerce is confined to commerce between state or foreign governments. Sales made on the reservations to individual members of the tribes constitute "Commerce with the Indian Tribes" as those words are used in Article I, Section 8, Clause 3 of the United States Constitution. In *United States v. Holliday*, 3 Wall. 407, 417 (1886) this Court stated:

> "Commerce with foreign nations, without doubt, means commerce between citizens of the United States and citizens or subjects of foreign governments, as individuals. And so commerce with the Indian tribes, means commerce with the individuals composing those tribes."

See also: *United States v. 43 Gallons of Whiskey (United States v. Lariviere)*, 23 Wall. 188, 194 (1876).

The federal objects to be obtained by Congressional regulation of foreign, interstate and Indian commerce can not be achieved by a narrower interpretation.

B. The Arizona Tax is a Privilege Tax:

In addition, it is necessary to appellant's position to establish that the description "privilege tax" is properly applicable to the tax in question.

The Arizona tax is self-described as a privilege tax. It forbids engaging in the businesses therein designated until a privilege license has been obtained. Arizona Revised Statutes § 42-1308.A provides in pertinent part:

> "Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege

license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. . . ."

In its decision in this case, the Arizona Supreme Court characterized the tax as a privilege tax. *Warren Trading Post Company v. Moore,* 95 Ariz. 110, 113, 387 P.2d 809, 811-812 (1963). It has been repeatedly so characterized by that Court in the past. *State Tax Commission v. Quebedeaux Chevrolet,* 71 Ariz. 280, 284, 226 P.2d 549, 552 (1951); *Arizona State Tax Commission v. Ensign,* 75 Ariz. 220, 223, 254 P.2d 1029, 1031, *reh. denied* 75 Ariz. 376, 257 P.2d 392 (1953); *Arizona State Tax Comm. v. Garrett Corporation,* 79 Ariz. 389, 391, 291 P.2d 208, 209 (1955); *State Tax Commission v. Consumers Market, Inc.,* 87 Ariz. 376, 379, 351 P.2d 654, 655 (1960); *Combustion Engineering v. Arizona State Tax Comm.,* 91 Ariz. 253, 259, 371 P.2d 879, 883 (1962).

All other Arizona taxes (real and personal property, income, luxury, etc.) are levied alike upon those Arizonans who do and those who do not pay a privilege tax. Privilege taxpayers, by reason of paying such tax, are neither given credit against, nor exempted from, any other tax. Arizona Revised Statutes, Title 42, Taxation.

If a state "privilege tax" does not replace a property or other tax and if the state legislative label, "privilege tax," and long continued state supreme court interpretation are identical, such designation is entitled to great weight. Indeed, it may be conclusive. *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951); *Railway Express Agency, Inc. v. Virginia,* 347 U.S. 359 (1954); *Railway Express Agency v. Virginia,* 358 U.S. 434 (1959).

C. A state may not tax the privilege of engaging in interstate or foreign commerce:

The third step in showing that the states may not tax the privilege of engaging in Indian commerce involves an ex-

amination of this Court's holdings in the related fields of interstate and foreign commerce.

Balancing the equities in the field of interstate commerce never has been an easy task. On the one hand, the states need local revenue. To the extent they render services it would seem their claim to a commensurate portion of interstate revenue has merit. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435, 444 (1940). On the other hand, the framers of the Constitution, in giving Congress the right to regulate interstate commerce, recognized that trade barriers between the states could impede the economic development of the nation.

Over the years this Court has permitted a variety of state taxes whereunder interstate business can be made to pay its own way[6]. However, "it is beyond dispute that a State may not lay a tax on the 'privilege' of engaging in interstate commerce". *Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959). See: *General Motors Corporation v. Washington*, 32 L.W. 4482, ... U.S. ....., 12 L.ed 2d 430 (1964); *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951); *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954); *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389 (1952); *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203 (1924); *Ozark Pipe Line Corp. v. Monier*, 266 U.S. 555 (1924).

It is equally well settled that a state may not lay a tax upon the privilege of engaging in foreign commerce. *Crew Levick Company v. Pennsylvania*, 245 U.S. 292, 295, 297 (1917); *Brown v. Maryland*, 12 Wheat. 419, 447-449 (1827).

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[6]Use taxes, *Turner v. Wright*, 11 Ill. 2d 161, 142 N.E. 2d 84, *appeal dismissed*, 355 U.S. 65 (1957); fairly apportioned net income taxes, *Portland Cement v. Minnesota*, 358 U.S. 450 (1959); and the imposition of sales taxes upon local activities incident to interstate commerce, *Norton v. Department of Revenue*, 340 U.S. 534 (1951); *Field Enterprises, Inc. v. Washington*, 47 Wash. 2d 852, 289 P.2d 1010, *aff'd*, 352 U.S. 806 (1956); *General Motors Corporation v. Washington*, 32 LW 4482, ... U.S. ....., 12 L.ed 2d 430 (1964).

It is submitted that the basic factor which historically has caused this Court to prohibit the states from directly licensing and taxing the privilege of engaging in interstate and foreign commerce is the national character of such commerce. Otherwise stated, the purposes and objects to be achieved in these areas affect the nation as a whole and thus are of a nature which can either be best attained or only attained by federal control. They could be impaired or destroyed if individually regulated by each of the fifty states. As stated by Justice Curtis in *Cooley v. Board of Wardens,* 12 How. 299, 319 (1851):

> "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." See also annot. in 82 L.ed 14-20 for collection of cases respecting the "national character of commerce" doctrine.

Chief Justice Marshall considered this proposition and the historical background which required it in *Brown v. Maryland,* 12 Wheat. 419, 445, 446 (1827):

> "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. . . . Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would

tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

Thereafter, the concept of the national character of foreign and interstate commerce became so basic a part of our legal philosophy that ninety years later, in *Crew Levick Company v. Pennsylvania,* 245 U.S. 292 (1917), the Court found it necessary only to offer case citations, without discussion, to support its view that a state tax levied directly upon foreign commerce is prohibited. And, in the 1951 case of *Spector Motor Service v. O'Connor,* 340 U.S. 602, the citation of *M'Culloch v. Maryland,* 4 Wheat. 316 (1819) alone was deemed sufficient to support the Court's view that interstate commerce must be free from state taxation. Thus, once it is affirmatively determined that the "operating incidence" of the tax is directly upon the privilege of engaging in interstate or foreign commerce, the national character of such commerce and the reasons requiring its exclusive regulation by Congress are assumed.

D. The rule prohibiting state privilege taxes upon interstate and foreign commerce should apply with equal force to Indian commerce:

We submit that Indian commerce is as national in character as interstate and foreign commerce. A brief examination of some of the principal purposes and objects of each of these fields of commerce demonstrates the point. For example, federal control of commerce with the Indian tribes is designed to aid the Indians in their economic development.[7] The interstate counterpart of this is federal protection of free trade among the states to aid in the overall development of the national economy. And federal control of foreign commerce (ranging from maintaining open trade in some cases to providing tariffs or embargos in others) also is designed to preserve and enhance the economic development of the country

[7]See discussion of the purposes of Congressional legislation for Indians in *Williams v. Lee,* 358 U.S. 217, 220-222 (1959).

as well as to serve the needs of economic diplomacy.

In each case, the character of the subject being considered is national. No one would contend that the question of tariffs should be left to the separate decisions of the individual states; or that the separate states should be permitted to determine individually whether there should be trade barriers among them. Separate state interests might differ from the national interest. Therefore, decisions based upon such separate interests might threaten the national welfare. The problems involved concern not some but all of the states.

Indian commerce is equally national in scope. Its proper regulation should not be left to the will of the separate states. Recognizing that the power to license and tax a privilege "is the power to control or suppress its enjoyment," *Murdock v. Pennsylvania,* 319 U.S. 105, 112 (1943), the attempted individual regulation of Indian commerce by the twenty-five states containing Indian reservations[8] soon would lead to chaos.

For instance, on the Navajo reservation, which stretches across Arizona, New Mexico and Utah, what if each of those states charged traders differently for the privilege of conducting Indian commerce (or one made a charge while the others did not)? What if one prohibited the sale of certain commodities and the others did not? What if one licensed any person who chose to be a trader and was willing to pay a license fee while the others required a showing of high moral character? What if one or all of these states forbid any commerce at all?[9] The possibilities posed by these questions demonstrate that any program for the commercial protection and development of the Indian tribes, by its nature, must not be left to the separate decisions of twenty-five different states.

While this Court never has considered whether a state may tax the privilege of engaging in Indian commerce, its past de-

[8]For a list of such states, see p. 13, fn. 1, *supra.*

[9]See pp. 23, 24, *infra;* 25 U.S.C. §§ 261-264; 25 C.F.R. §§ 251-252.

cisions reflect an acknowledgment of the national character of such commerce.'

The Court early declared that Congress has the supreme right to regulate commerce with any Indian tribe although the tribe dwells within the territorial confines of a state. *United States v. Holliday,* 3 Wall. 407, 418 (1866); *Gibbons v. Ogden,* 9 Wheat. 1, 196 (1824). Further, as long as the Indians remain a distinct people with existing tribal organizations, laws and customs, Congress has the power to say with whom and on what terms they shall deal. *Williams v. Lee,* 358 U.S. 217 (1959); *United States v. 43 Gallons of Whiskey (United States v. Lariviere),* 23 Wall. 188, 195 (1876). The power of Congress to govern Indian commerce stems not only from express Constitutional authorization but from long continued legislative and executive usage and the duty to exercise a fostering care and protection over dependent communities. *United States v. Sandoval,* 231 U.S. 26, 45, 46 (1913); *United States v. Kagama,* 118 U.S. 375, 383, 384 (1886). Only Congress (and not the courts) properly can determine when the need for such guardianship shall cease. *Tiger v. Western Investment Co.,* 221 U.S. 286, 313-315 (1911).

It has been said that the power of Congress over Indian commerce is not less than its power over interstate commerce, *Hanley v. Kansas City Southern Ry. Co.,* 187 U.S. 617, 619 (1903); that it is exclusive, unfettered and as broad as the power to regulate commerce with foreign nations, *United States v. 43 Gallons of Whiskey, supra* at 194; and that it is much broader than that over commerce among the states, 1 Willoughby, *The Constitution of the United States* (2d ed.) § 226, p. 398; Prentice and Egan, *The Commerce Clause of the Federal Constitution,* p. 342 (1898). Mr. Justice Harlan, writing for this Court in *Dick v. United States,* 208 U.S. 340, 356 (1908), quoted with approval from *United States v. 43 Gallons of Whiskey* as follows:

" 'Chief Justice Marshall, . . . with a force of reasoning

and an extent of learning rarely equaled, stated and explained the condition of the Indians in their relation to the United States and to the states within whose boundaries they lived; and his exposition was based on the power to make treaties and regulate commerce with the Indian tribes. Under the Articles of Confederation, the United States had the power of regulating the trade and managing all affairs with the Indians not members of any of the states, provided that the legislative right of a state within its own limits be not infringed or violated. Of necessity, these limitations rendered the power of no practical value. This was seen by the convention which framed the Constitution; and Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and as free from restrictions as that to regulate commerce with foreign nations. . . .'"

We submit, therefore, that both logic and law support the same absolute prohibition against the states licensing and levying a privilege tax upon Indian commerce as that which has long existed with respect to both interstate and foreign commerce. Even had Congress not occupied the field, it is appellant's position that Indian commerce should be free from state control.

IV INDIAN COMMERCE IS CLOSED TO STATE REGULATION BECAUSE CONGRESS HAS PREEMPTED THE FIELD WITH A COMPREHENSIVE SYSTEM OF FEDERAL LAW:

A. Congress has occupied the field:

It is appellant's alternate position, however, that the Congress has fully occupied the field with a comprehensive system of federal law which not only governs every phase of Indian commerce but specifically vests the sole authority to regulate it in the Commissioner of Indian Affairs. 19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179

(1882), R.S. § 2132, 25 U.S.C. §§ 261-264; 22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958), Appendix A. Accordingly, any concurrent state regulation of Indian commerce is necessarily "inconsistent with or burdensome to federal purposes or laws" (being the test declared applicable by the majority opinion of the Arizona Supreme Court (R. 30)). Thus, even pursuant to such test, a state license and privilege tax upon the privilege of conducting Indian commerce is invalid.

The first section of the Congressional Act vesting power in the Commissioner of Indian Affairs merits being set forth in full:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians." Aug. 15, 1876, c. 289, § 5, 19 Stat. 200, 25 U.S.C. § 261.

The succeeding sections of the Act permit trade with the Indians only by those approved by the Commissioner and only under such rules as the Commissioner may prescribe for Indian protection; give the President of the United States the power to prohibit all Indian trade and revoke all licenses therefor whereever the public interest requires; and subject anyone who attempts to engage in Indian trade on the reservation without a license to the forfeiture of all of his merchandise and a penalty of $500.00. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066, Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009, 25 U.S.C. § 262; R.S. § 2132, 25 U.S.C. § 263; R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179, 25 U.S.C. § 264.

Federal regulations, in addition to paraphrasing these sections, prohibit those employed in Indian Affairs from being traders except under specified conditions; permit only specified small

purchases by government employees of articles offered for sale by Indians; prohibit the sale of arms and ammunition to the Indians except upon permission of the Superintendent; set forth what must be included in the application to be licensed as an Indian trader, including testimonials as to character, the proposed location of the trading post, the amount of money to be invested and the names of the clerks to be employed; set forth the bonding requirements; restrict licenses to periods of one year on some reservations while permitting a longer period on the Navajo, Zuni and Hopi Reservations; give the Superintendent the right to close unlicensed stores; confine trade to the licensed premises; prohibit gambling on the premises; prohibit trade in antiquities; prohibit tobacco sales to minors and sales of intoxicating liquors and certain dangerous drugs to anyone; prohibit Sunday trading; require fair prices and prescribe the conditions under which credit may be advanced and pawn or pledges of personal property accepted as security. 25 C.F.R. §§ 251.1; 252.1; 251.2; 252.2; 251.3; 252.3; 251.5; 252.4; 251.6; 252.5; 251.8; 251.9; 252.6; 251.10; 252.9; 251.11; 251.12; 252.10; 252.11; 251.13; 251.14; 252.13; 251.21; 252.15; 251.25; 252.24; 251.17; 251.18; 251.19; 252.26; 251.22; 252.16.

Some of the federal purposes to be achieved by these regulations are to provide for the Indians an opportunity to purchase needed and non-harmful goods and wares at fair prices under fair credit terms from convenient locations operated by people of high moral character who are subject to complete federal control.

The attempt by Arizona to grant to an Indian trader the privilege of selling anything, at any price, and under any credit terms anywhere on the reservation is inconsistent with these concepts. Even if Arizona attempted to grant this privilege only to those already licensed and approved by federal regulations, the State has not given anything for which it can ask a return. *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435,

444 (1940), cited with approval in *General Motors Corp. v. Washington*, 32 L.W. 4482, 4484, ... U.S. ....., 12 L.ed 2d 430, 435 (1964). Only the authority actually conferring a privilege should be permitted to impose conditions upon it. *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 288 (1898); *Arenas v. United States*, 140 F. Supp. 606, 608 (1956), *aff'd sub. nom. Kirkwood v. Arenas*, 243 F.2d 863 (9th Cir. 1957). The federal government, not the State of Arizona, actually confers upon Indian traders the privilege of trading with the Indians.

B. The tests for total occupation of the field are met:

In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-231 (1947), this Court considered whether federal regulation of grain elevators had preempted that field from concurrent regulation by the states. The Court noted that (as opposed to Indian commerce) regulation of grain elevators was a field traditionally occupied by the states and, therefore, state police powers were not to be superseded by federal regulation unless that was the clear and manifest purpose of Congress.

The Court set forth the following tests to determine whether federal preemption had occurred: Is the "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it"? Does "the Act of Congress . . . touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject"? Does "the object sought to be attained by federal law and the character of the obligations imposed by it . . . reveal the same purpose"? Might "the state policy . . . produce a result inconsistent with the objective of the federal statute"? Might "state and federal regulations collide"? See also: *Pennsylvania v. Nelson*, 350 U.S. 497, 501-505 (1956).

Each of these questions (reflecting the Court's tests in the *Rice* case) requires an affirmative answer when applied to

the instant case and thereby demonstrates total federal occupation of the field. And when it is considered that this case concerns commerce (not state police power) and a field traditionally occupied by the federal government alone (rather than by the states alone) these answers become an even more persuasive reflection of federal preemption.

C. The Papago Tax illustrates the need to prohibit the states from attempting to regulate Indian commerce:

In appellant's motion for rehearing (R. 44-46) before the Arizona Supreme Court in the instant case, appellant apprised that Court that after oral argument the Papago Tribal Council had enacted its own Privilege Tax Ordinances, levying a tax of 3% upon the gross receipts from sales made within the confines of the reservation.[10]

An inspection of the ordinances and "no objection" letters from the Department of Interior indicates the position of the Papago Tribe that: Arizona has no jurisdiction to levy a privilege tax on the Papago Reservation (first "whereas" of Ordinance 43); by Congressional enactment, the sole authority over all aspects of Indian trade or commerce resides in the Commissioner of Indian Affairs (second "whereas" of Ordinance 43, first "whereas" of Ordinance 44); the Papago Constitution provides for the passage of Ordinances essential to Tribal welfare (third "whereas" of Ordinance 43, second "whereas" of Ordinance 44); the tax is necessary to meet the financial needs of the Tribe (Fourth "whereas" of Ordinance 43, third of Ordinance 44); it will be administered by the Tribal Council and

[10]Papago Tribal Ordinance 43, its correcting Ordinance 44, and the Department of Interior's "no objection" letters relating to each, are reprinted as Appendix B to this brief. The apparent difference between the two Ordinances is that the first (Ordinance 43) attempts to remit to the State of Arizona that portion of the total receipts estimated to be applicable to reservation sales to non-Indians. The second Ordinance eliminates these provisions.

enforced by the Tribal Courts or other courts of competent jurisdiction (Sections 7, 8, Ordinance 43, sections 4, 5, Ordinance 44); and the concluding paragraph of each Ordinance indicates that it becomes effective only "after its approval by the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6, Article V of the Constitution and By-Laws of the Papago Tribe." The position of the Department of Interior is consistent with the foregoing as reflected by its "no objection" letters and by the Solicitor's May 20, 1948 Memorandum on the subject, 60 I.D. 176.

The Papago tax also reveals an important aspect of the federal government's Indian policy. The federal government gradually has given more responsibility for Indian affairs to the Indian tribes. See Navajo-Hopi Rehabilitation Act of 1950, 64 Stat. 46, 25 U.S.C. § 636. When the Department of the Interior allowed the Papago Tribal Council to levy such a tax, it was part of the federal government's general program to make Indians more responsible for their own affairs. Permitting Arizona to duplicate the Papago tax would conflict with federal Indian policy and would inhibit the growth of tribal self-government.

An example of a serious practical problem which will arise if both the Papago Tribal tax and the Arizona tax are permitted to apply is provided by the distribution of the traders' resultant increase in the cost of doing business. To the extent that the Commissioner of Indian Affairs permits the trader to raise his prices (25 U.S.C. § 261; 25 C.F.R. § 251.22), the Papago Indians will bear the brunt of the tax burden. To the extent the Commissioner refuses, the burden will be borne by the Papago Reservation traders, who then become the only Arizona retailers prohibited by law from "passing on" the privilege tax, and thus the subject of discrimination in both the legal and practical sense. At some level of taxation the effect will be to (1) discourage qualified persons from being Indian traders on

the Papago Reservation, or (2) discourage commerce among the Papagos, or (3) compel the repeal of the Papago tax in order to lessen the burden on commerce, or (4) some combination of these. And unless the Arizona tax is prohibited, such results will be beyond the power of the Commissioner to prevent. Identical results will occur on other reservations if and when other tribes, with the consent of the Commissioner, adopt privilege taxes.

The Papago tax illustrates the dangers of state participation in the field of Indian commerce by showing how the resulting collisions directly threaten that commerce. It illustrates why the authors of the Constitution reserved the regulation of Indian commerce to the Congress.

V ONLY BY EXPRESS CONGRESSIONAL GRANT MAY THE STATES DIMINISH THE RIGHT OF INDIANS TO GOVERN THEMSELVES. THE FIELD OF INDIAN COMMERCE HAS NOT BEEN THE SUBJECT OF SUCH A GRANT:

In *Williams v. Lee,* 358 U.S. 217 (1959), this Court prohibited an Indian trader on the Navajo Reservation in Arizona from suing a Navajo Indian and his wife in the State Superior Court to collect for goods sold to them on credit. The opinion refers to the act of Congress which permits the states to assume concurrent civil and criminal jurisdiction on Indian reservations providing the states appropriately amend their constitutions or statutes. Act of Aug. 15, 1953, c. 505 §§ 6, 7, 67 Stat. 590. Reference is further made to Arizona's express disclaimer of such jurisdiction in its Enabling Act and Constitution. Arizona Enabling Act § 20, 36 Stat. 569; Arizona Constitution, Art. XX, Fourth, (Appendix A). And, on the basis of the legislative history, the opinion states at 222-223:

> "To date, Arizona has not accepted jurisdiction, possibly because the people of the State anticipate that the burdens accompanying such power might be considerable."

The Court makes it clear that if the authority of Indian governments over their own reservations is to be diminished, the Congress must be the one to do it, citing *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564-566 (1903). Having failed to meet the Congressionally fixed conditions precedent, Arizona's claim to jurisdiction must fail.

Applying this rule to Indian commerce, there has been no act of Congress granting to the states the right to exercise concurrent control.[11] Yet Indian commerce is as inherent a part of Indian self-government as court jurisdiction. Therefore, under the rule of *Williams v. Lee, supra,* no concurrent state control of Indian commerce can be presumed. And Arizona's history of non-acceptance of responsibility even in a Congressionally permitted area of dual control (court jurisdiction) underscores Arizona's absence of authority in the field of Indian commerce.

In reviewing the history of past decisions in the field of Indian law, this Court indicated in *Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962), that state laws may not apply where they would interfere with reservation self-government or impair a right granted or reserved by federal law. The Arizona Privilege Tax interferes with reservation self-government as evidenced by its conflict with the Papago tax. The Arizona Privilege Tax impairs the right to regulate Indian commerce reserved to the Congress by the Constitution, as evidenced by its conflict with federal regulation of traders.

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[11]The Buck Act [61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110] is not a grant of power to the states to tax Indian commerce on an Indian reservation. The only court which has considered the question of the applicability of that Act to an Indian reservation decided that the statutory definition of "federal area" (4 U.S.C. § 110(e)), does not include an Indian reservation and, therefore, a municipal sales tax could not be levied against a business on the reservation. *Your Food Stores, Inc. v. Village of Espanola*, 68 N.M. 324, 334, 361 P.2d 950, 955-956 (1961). In any event, the immunity from state taxation of an Indian trader is not a consequence of his physical situs on an Indian reservation but of the commerce he conducts with the Indian tribes, the regulation of which is exclusively within the domain of the United States. 58 I.D. 562 (1943).

CONCLUSION:

Arizona is the first state to attempt to license and tax the privilege of engaging in Indian commerce. New Mexico and California have followed suit. Other states soon may make similar attempts. Such separate and uncoordinated regulation of Indian commerce by the twenty-five states containing Indian reservations would constitute a serious interference with the power reserved to Congress to regulate commerce with the Indian tribes.

The resolution of this problem is necessary to fix the boundaries of power among the Federal Government, the States and the Indian tribes with respect to the control of Indian commerce. Only a determination prohibiting the states from licensing and levying a privilege tax on Indian commerce is consistent with prior law, the national character of Indian commerce and the federal objects and purposes to be served in furthering the economic development of the reservation Indians. Only such a determination will prevent a direct conflict with federal regulation of Indian commerce and federally approved Indian regulation of Indian commerce.

For the foregoing reasons, it is respectfully submitted that the judgment of the Arizona Supreme Court should be reversed and that the licensing and imposition of the Arizona Privilege Tax upon Indian traders for the privilege of making sales on the Indian reservations to reservation Indians, pursuant to Arizona Revised Statutes §§ 42-1308.A and 42-1312.A and the Arizona Tax Commission's Regulation 2.18.5, should be held to violate that portion of Article I, Section 8, Clause 3 of the United States Constitution which states: "The Congress shall have Power . . . To regulate Commerce . . . with the Indian Tribes."

Edward Jacobson
Attorney for Appellant

November 25, 1960

Appendix A

[redacted]

[redacted]

Constitutional Provisions, Statutes and Regulations A1

United States Constitution A1

United States Statutes A1

Federal Regulations A5

Arizona Enabling Act A22

Arizona Constitution A23

Arizona Revised Statutes A25

Arizona Tax Commission Regulations A26

APPENDIX A

Constitutional Provisions, Statutes and Regulations

United States Constitution, Art. I, § 8, cl. 3:

"The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

United States Statutes:

19 Stat. 200 (1876), 31 Stat. 1066 (1901), 32 Stat. 1009 (1903), 22 Stat. 179 (1882), R.S. § 2132, 25 U.S.C. §§ 261-264:

§ 261

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. Aug. 15, 1876, c. 289. § 5, 19 Stat. 200.

§ 262

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians. Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994. § 10, 32 Stat. 1009.

§ 263

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications

therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued. R.S. § 2132.

§ 264

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.

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61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110:

§ 105

(a) No person shall be relieved from liability for payment of, collection of, or accounting for any sales or use tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, on the ground that the sale or use, with respect to which such tax is levied, occurred in whole or in part within a Federal area; and such State or taxing authority shall have full jurisdiction and

power to levy and collect any such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to sales or purchases made, receipts from sales received, or storage or use occurring, after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 106

(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.

(b) The provisions of subsection (a) shall be applicable only with respect to income or receipts received after December 31, 1940. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 107

(a) The provisions of sections 105 and 106 of this title shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof, or the levy or collection of any tax with respect to sale, purchase, storage, or use of tangible personal property sold by the United States or any instrumentality thereof to any authorized purchaser.

(b) A person shall be deemed to be an authorized purchaser under this section only with respect to purchases which he is permitted to make from commissaries, ship's stores, or voluntary unincorporated organizations of personnel of any branch of the Armed Forces of the United States, under

regulations promulgated by the departmental Secretary having jurisdiction over such branch. July 30, 1947, c. 389, § 1, 61 Stat. 641, amended Sept. 3, 1954, c. 1263, § 4, 68 Stat. 1227.

§ 108

The provisions of sections 105 to 110 of this title shall not for the purposes of any other provision of law be deemed to deprive the United States of exclusive jurisdiction over any Federal area over which it would otherwise have exclusive jurisdiction or to limit the jurisdiction of the United States over any Federal area. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 109

Nothing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed. July 30, 1947, c. 389, § 1, 61 Stat. 641.

§ 110

As used in sections 105-109 of this title —

(a) The term "person" shall have the meaning assigned to it in section 3797 of title 26.

(b) The term "sales or use tax" means any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property, except a tax with respect to which the provisions of section 104 of this title are applicable.

(c) The term "income tax" means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.

(d) The term "State" includes any Territory or possession of the United States.

(e) The term "Federal area" means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States;

and any Federal area, or any part thereof, which is located within the exterior boundaries of any State, shall be deemed to be a Federal area located within such State. July 30, 1947, c. 389, § 1, 61 Stat. 641.

Federal Regulations:

22 F.R. 10670-74 (1957), 25 C.F.R. §§ 251-252 (1958):

§ 251.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes. Any person desiring to trade with the Indians on any reservation may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe.

§ 251.2 Presidential Prohibition

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or of any particular articles, into the country belonging to any Indian tribe, and to direct that all licenses to trade with such tribe be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe.

§ 251.3 Forfeiture of Goods

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokee, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes: *And*

provided further, That no white person shall be employed as a clerk by any Indian trader, except as such trade with said Five Civilized Tribes, unless first authorized so to do by the Commissioner of Indian Affairs.

§ 251.5 Government employees not to trade with Indians except in certain cases

Save as authorized by the act of June 19, 1939 (53 Stat. 840; 25 U.S.C. 68a, 87a, 441), no person employed in Indian affairs shall have any interest or concern in any trade with the Indians except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office. Pending the promulgation of regulations prescribing in more detail the transactions authorized by the act of June 19, 1939, employees of the United States Government, including those in the Bureau of Indian Affairs, may be permitted to trade with Indians or Indian organizations under the conditions specified below:

(a) Employees of the United States Government, including those in the Bureau of Indian Affairs may, with the approval of the Secretary of the Interior in each case where the amount involved exceeds $100, or with the approval of the superintendent or other officer in charge, where the amount involved does not exceed $100, be permitted to purchase from any Indian or Indian organization any arts and crafts or any other product, service or commodity produced, rendered, owned, controlled or furnished by any Indian or Indian organization: *Provided,* That no employee of the United States Government shall be permitted to make any such purchases for the purpose of engaging directly or indirectly in the commercial selling, reselling, trading, or bartering of said purchases by the said employee: *And provided further,* That employees in Alaska may in each case make such purchases with the approval of the Secretary of the Interior where the amount involved exceeds $250, and with

the approval of the superintendent or other officer in charge where the amount involved does not exceed $250.

(b) *United States Employees, Indian blood.* Indian employees of the United States Government, of whatever degree of Indian blood, may be members in the same manner as other Indian members of the tribe not so employed and receive benefits by reason of their membership in such tribes in corporation or cooperative associations, organized by and operated for Indians. Such Indian government employees may engage in all lawful transactions with Indians, Indian tribes and such corporations or cooperative associations. None of the transactions authorized herein may be entered into by such employees for the purpose of engaging directly or indirectly in the selling, releasing, trading, bartering or passing on in any other way for profit the objects, rights, services or property thus acquired. Nothing in this section shall prevent in proper cases the disposition of any such property when such transaction cannot be considered as actually engaging in any of the businesses prohibited in this section. All transactions authorized herein to be valid must be approved by the Secretary of the Interior.

(c) *Leases or sales restricted Indian land.* Leases or sales of trust or restricted Indian land to or from Indian employees of the United States Government must be made on sealed bids unless the Commissioner of Indian Affairs waives this requirement on the basis of a full report showing (1) the need for the transaction, (2) the benefits accruing to both parties, and (3) that public bids are not feasible and could not be expected to bring a higher price than the proposed private transaction. An affidavit as follows shall accompany each proposed land transaction:

I, ..., ...
(Name) (Title)

swear (or affirm) that I have not exercised any undue in-

fluence nor used any special knowledge received by reason of my office in obtaining the (grantor's, purchaser's, vendor's) consent to the instant transaction.

(53 Stat. 840; 25 U.S.C. 68a, 87a, 441)

§ 251.6 Small Purchases

The purchase in small quantities for home use or consumption by Government employees or others, of blankets, baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

§ 251.8 Regulating Sale of Arms and Ammunition

Arms and ammunition may not be sold to the Indians by traders except upon permission of the superintendent, which will be granted only for clearly established lawful purposes.

§ 251.9 Application for License

Application for license must be made in writing on Form 5-052, setting forth the full name and residence of the applicant; if a firm, the firm name and the name of each member thereof; the place where it is proposed to carry on the trade; the capital to be invested; the names of the clerks to be employed; and the business experience of the applicant. The application must be forwarded through the superintendent to the Commissioner of Indian Affairs, accompanied by two satisfactory testimonials on Form 5-077 as to the character of the applicant and his employees and their fitness to be in the Indian country, and by an affidavit of the superintendent on Form 5-053 that neither he nor any person for him has any interest, direct or indirect, present or prospective, in the proposed business or the profits arising therefrom, and that no arrangement for any benefit to himself or to any other person on his behalf is contemplated in case the license is granted. Licensed traders will be held responsible for the conduct of their employees.

§ 251.10 Bond Requirements

(a) Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of $10,000, or such less sum as may be designated by the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U.S.C. 6-13). The bond shall be for the same period covered by the license.

(b) The residence of each principal and surety must be distinctly stated, and the signature of each of them attested by two witnesses, and it must appear for whom each witness signs.

(c) Individual sureties must not be bonded officers of the United States, attorneys having business before the Bureau of Indian Affairs, or employees of the principal.

§ 251.11 License Period

No license will be granted for a longer period than 1 year; but at the end of that time, if the Commissioner of Indian Affairs is satisfied that the trade has been conducted properly and that the laws and regulations and terms of the license have been duly observed, a new license may be granted.

§ 251.12 License Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on Form 5-054, through the superintendent, at least 30 days prior to the expiration of the existing license, and the superintendent must report as to the record the applicant has made as a trader and his fitness to continue as such under a new license.

§ 251.13 Power to Close Unlicensed Stores

If persons carry on trade within a reservation with the Indians without a license, or continue to trade after expiration

of the license without applying for renewal, the superintendent will immediately report the facts in the case to the Commissioner of Indian Affairs, who may, if necessary, direct the superintendent to close the stores of such traders.

§ 251.14 Trade Limited to Specified Premises

No trade with Indians is permitted at any other place than that specified in the license. Licenses do not cover branch stores. A separate license and bond must be furnished for each such store. The business of a licensed trader must be managed by the bonded principal, who must habitually reside upon the reservation, and not by an unbonded subordinate.

§ 251.15 License Applicable for Trading Only by Original Licensee

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the Commissioner of Indian Affairs. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation. The use of reservation lands, whether tribal or allotted, for such purposes can be obtained by a trader only upon the terms and under the restrictions which apply to other persons. His license gives him no advantage over others in this respect.

§ 251.16 Trade in Annuities or Gratuities Prohibited

Traders are forbidden to buy, trade for, or have in their possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians may not be purchased by any trader, not a member of the tribe to which the owner or possessors

of the cattle belong, except with the written consent of the agent of said tribe.

§ 251.17 Tobacco Sales to Minors

No trader shall sell tobacco, cigars, or cigarettes to any Indian under 18 years of age.

§ 251.18 Intoxicating Liquors

No trader shall use or permit to be used his premises for any unlawful conduct or purpose whatsoever. No trader shall use or permit to be used any part of his premises for the manufacture, sale, gift, transportation, drinking or storage of intoxicating liquors or beverages in violation of existing laws relating thereto. Violation of this section will subject the trader to criminal prosecution, revocation of license and such other action as may be necessary.

§ 251.19 Drugs

Traders shall not keep for sale, or sell, give away, or use any opium, chloral, cocaine, peyote or mescal bean, hashish or Indian hemp or marihuana, or any compound containing either ingredient, and for violation hereof the trader's license shall be revoked.

§ 251.21 Gambling

Gambling, by dice, cards, or in any way whatever, is strictly prohibited in any licensed trader's store or on the premises.

§ 251.22 Inspection of Traders' Prices

It is the duty of the superintendent to see that the prices charged by licensed traders are fair and reasonable. To this end the traders shall on request submit to the superintendent or inspecting officials the original invoice, showing cost, together with a statement of transportation charges, retail price of articles sold by them, the amount of Indian accounts carried on their books, the total annual sales, the value of buildings, livestock owned on reservation, the number of

employees, and any other business information such officials may desire. The quality of all articles kept on sale must be good and merchantable.

§ 251.23 Credit at Traders' Risk

Credit given Indians will be at the trader's own risk, as no assistance will be given by Government officials in the collection of debts against Indians. Traders shall not accept pawns or pledges of personal property by Indians to obtain credit or loans.

§ 251.24 Cash Payments Only to Indians

Traders must not pay Indians in tokens, tickets, store orders, or anything else of that character. Payment must be made in money, or in credit if the Indian is indebted to the trader.

§ 251.25 Trade in Antiquities Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 251.26 Infectious Plants

Traders shall not introduce into, sell, or spread within Indian reservations any plant, plant product, seed or any type of vegetation, which is infested, or infected or which might act as a carrier of any pests of infectious, transmissible, or contagious diseases, as determined by the laws and regulations of the State for plant quarantine and pest control. For the purpose of enforcement of this provision State officers may enter Indian reservations, with the consent of the superintendent, to inspect the premises of such traders and otherwise to execute such State laws and regulations.

§ 252.1 Sole Power to Appoint

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes.

Any person desiring to trade with the Indians of the Navajo, Zuni, and Hopi Reservations may, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Comimssioner of Indian Affairs may prescribe.

§ 252.2 Presidential Prohibitions

The President is authorized, whenever in his opinion the public interest may require, to prohibit the introduction of goods, or any particular articles, into the country belonging to the Navajo, Hopi, and Zuni Indians and to direct that all licenses to trade with such tribes be revoked, and all applications therefor rejected. No trader shall, so long as such prohibition exists, trade with any Indians of or for said tribe or members of any other tribe residing on the Navajo, Zuni or Hopi Reservations.

§ 252.3 Forfeiture of Goods

Any person whether Indian or white who shall establish himself as a trader within the exterior boundaries of the Navajo, Hopi, or Zuni Reservations, or introduce goods or trade therein, without a license, shall forfeit all merchandise offered for sale to the Indians or found in his possession and shall moreover be liable to a penalty of $500.

§ 252.4 Government Employees Not to Trade with Indians

No person employed by the United States Government shall have any interest or concern in any trade with the Indians, except for and on account of the United States; and any person offending herein shall be liable to a penalty of $5,000 and shall be removed from his office.

§ 252.5 Purchase in Small Quantities Allowed

This purchase in small quantities for home use or consumption by Government employees or others, of blankets,

baskets, etc., and articles of subsistence offered for sale by Indians, is held not to constitute trading with Indians within the meaning of section 2078 of the Revised Statutes.

§ 252.6 Application for License

Application for license or renewal of license must be made in writing on a form provided by the Commissioner of Indian Affairs, setting forth the full name and residence of the applicant and three responsible references. If applicant is a firm, the firm name and the name of each member thereof; the place where it is proposed to conduct the trading post; and upon the request of the superintendent, the capital invested or to be invested and of this the amount of capital owned and the amount borrowed, or to be borrowed; the name of the lender of the borrowed capital; the date due, the rate of interest to be paid; indorsers and security; copy of any contract or trade agreement, or agreements, oral or written, with creditors or financing individuals or institutions, including any stipulations whereby financing fees are to be paid, directly or indirectly, tending to restrict the trader as a bargainer in the wholesale markets or otherwise to increase the delivered wholesale costs of merchandise at the trading posts. Application must be accompanied by satisfactory evidence as to the character, experience, and business ability of applicant and his employees and their general fitness to reside on the Indian reservation. All such information shall be considered as confidential. No employee in the Government service shall exert undue influence, direct or indirect, to help any applicant secure a license.

§ 252.7 Records, Reports and Obligations of Traders

(a) Each trader shall keep in a form approved by the Commissioner of Indian Affairs accurate records of his business activities and render annually not later than March 1 a report to the superintendent showing capital investment, increases and withdrawals, whether in the form of cash, mer-

chandise, or other property; the value of buildings and improvements, furnishings and fixtures, miscellaneous assets such as automobiles, trucks, or other property essential to the business; a complete record of all liabilities, including accounts, bills and notes payable, and the amount of cash received and disbursed, balances, whether on hand, on deposit, or due the store; the accounts, and notes receivable, and the pawns of pledges taken. The names and respective interests of all persons participating in the business shall be furnished.

(b) The price of all articles of merchandise placed on sale shall be plainly and visibly marked by the trader.

§ 252.8 Licensee; Owner of Trading Post

A licensee of a trading post shall be the owner of the business. He shall be responsible to the Commissioner of Indian Affairs for the entire operation of the trading post, including acts of commission or omission of his employees, and for reports required by the Commissioner of Indian Affairs.

§ 252.9 Bond Requirements

Application for license must be accompanied by a bond in the name of the proposed licensee in the amount of $10,000, or such less sum as may be designated by the superintendent or the Commissioner of Indian Affairs, with two or more sureties approved by the superintendent, or with a guaranty company qualified under the act of August 13, 1894 (28 Stat. 279; 6 U. S. C. 6-13). The bond shall be for the same period covered by the license.

§ 252.10 License Period

Licenses to trade shall not be issued unless the proposed licensee has a right to the use of the land on which the business is to be conducted. The license period shall correspond to the period of the permit or lease held by the licensee on restricted Indian land. The license period in no

event shall exceed 25 years. Licenses for periods not to exceed 10 years may be issued by the area director.

§ 252.11 Application for Renewal

Application for renewal of license must be made to the Commissioner of Indian Affairs on a form prescribed by him, through the superintendent, at least 3 months prior to expiration of the existing license, and the superintendent must report to the Commissioner of Indian Affairs as to the record the applicant has made as a trader and his fitness to continue under such a license.

§ 252.12 Temporary Permits

No trader shall carry on trade with the Indians without a license, or continue to trade with the Indians after the expiration of the license. A temporary license for 3 months may be issued by the Commissioner of Indian Affairs, or his duly authorized representative, pending consideration of application for renewal of license. In case the trader has neither a temporary permit nor a renewal of license, the Commissioner of Indian Affairs or his duly authorized representative is authorized to close the trading post of such trader. Upon the approval of the tribal council concerned, a trader may be granted the use of not to exceed eight acres of tribal land as a site for a trading post, corrals and other buildings required in connection with the business.

§ 252.13 Trade Confined to Licensed Premises

All trade with Indians shall be confined to the premises specified in the license, except the buying of livestock and livestock products, which shall be covered by special permits issued by the superintendent.

§ 252.14 Subleasing; Livestock Herding Prohibited

No trader will be allowed to lease, sublet, rent, or sell any of the buildings which he occupies, for any purpose to any other person or concern, without the approval of the

Commissioner of Indian Affairs, and the consent of the tribal council concerned. A license to trade with Indians does not confer upon the trader any right or privileges in respect to the herding or raising of livestock upon the reservation or in conjunction with Indians.

§ 252.15 Gambling Prohibited

Gambling, by dice, cards, or in any way whatever including any mechanical device is strictly prohibited in any licensed trader's store or on the premises.

§ 252.16 Security

(a) Traders may accept pawns or pledges of personal property for security of accounts due to them by Indians. Traders shall be liable for the market value of all pawns or pledges held by them. The market value shall be settled by agreement between the Indian and the trader at the time of the transaction. In all cases where pawns or pledges are accepted by the trader a written receipt shall be given the Indian showing (1) the date of the transaction, (2) the nature of the pawn or pledge, (3) the amount loaned thereon, and (4) its market value as agreed upon between the Indian and the trader. A pawn or pledge not redeemed within 11 months shall be displayed in a conspicuous place in the trader's store for a period of 30 days together with a notice stating that unless the amount due, which shall be specified, is paid before the expiration of the 30 days, such pawn or pledge will be forfeited. At the expiration of 12 months from the date of the original loan, a pawn or pledge not redeemed shall become the property of the trader, in which event the amount due shall be cancelled on the trader's books. Notice of such cancellation shall be given in writing to the interested Indian.

(b) On the Navajo Reservation the period for the redemption of a pawn or pledge shall be 6 months unless at least 30 days prior to the expiration of such period not less

than 25% of the amount due has been paid, in which case the redemption period shall be 8 months; an additional period of 2 months shall be added to the redemption period for every additional 25% of the amount due that may be paid. The provisions of paragraph (a) of this section with respect to display, forfeiture, and payment within any 30 day period of grace, shall be applicable also to pawns or pledges taken on the Navajo Reservation.

§ 252.17 Credit at Trader's Risk

A trader may extend credit to Indians, but such credit will be at the trader's own risk. All payments to Indians for products or labor must be made in lawful United States money or in credit on the traders' books at the option of the Indian. Receipt must be given Indians for all articles they have sold to traders and on which they have requested book credit. These receipts must show the following information: (a) the date the transaction was made, (b) the amount paid the Indian, and (c) a description of the article or articles sold. All receipts issued by the trader for Indian products must be recorded in the trader's books in such manner that all information contained in the receipt is duplicated. Receipts may be transferred upon order of the initial recipient if it is to his convenience that such a procedure be followed.

§ 252.18 Government Checks Paid in Cash

Traders must pay all Government checks accepted in cash, merchandise or credit to the full value of the check presented. The acceptance of cash, merchandise, or credit for Government checks shall be at the option of the Indian in all cases.

§ 252.19 Premises Kept in Sanitary Condition

The traders shall keep both their premises and places of business in a clean, sanitary, and presentable condition at all times and shall avoid exposure of foodstuffs to infection from the air, dust, insects or handling. It shall be the duty of

the health officer of the reservation and their assistants to make periodical inspections, recommend improvements, and report thereon to the Commissioner of Indian Affairs or his duly authorized representatives.

§ 252.20 Traders' Responsibility

Traders shall be kept responsible through bond for any loss of Indians' property in their possession, including credit on books.

§ 252.21 License Fee

(a) An annual license fee of $50.00 shall be paid in advance by all licensed traders who are not members of the Navajo, Zuni, or Hopi Tribes. The area director shall determine the amount of such license fee to be paid by licensees who are members of the Navajo, Zuni, or Hopi Tribes. No such annual license fee shall exceed $50.00. All fees shall be deposited to the credit of the account "Indian Moneys, Proceeds of Labor, Navajo Agency (or Hopi or United Pueblos Agency)" and may be expended by the administrative official in the enforcement of the regulations in this part.

(b) On the Navajo Reservation, this license fee shall be paid on the basis of a calendar year regardless of any change in ownership of the business covered by the license unless the license be canceled for cause. When a license is issued following the cancellation of a license for cause or when a new business is established after the beginning of a calendar year, the license fee shall be determined on a quarterly basis, but the quarterly fee of $12.50 shall be charged also for a fraction of any quarter of a year. A transfer fee of $5.00 shall be collected whenever an unexpired license is transferred or assigned during a calendar year to a new owner of a trader's business.

(c) Deposits made by a temporary licensee under this part as provided by § 252.12 shall be refunded in the event a license is not issued unless the temporary licensee conducts

a trading business during the period of temporary operation in which event the temporary licensee shall be charged a fee on a quarterly basis for the period during which the business was conducted and the balance of the deposit shall be refunded.

§ 252.22 Grants and Donations Prohibited

No licensed trader shall be permitted to grant or donate any money or goods to the performance of any Indian dance or ceremony.

§ 252.23 Introduction of Livestock Prohibited

The introduction of livestock by traders or others into the Navajo, Hopi, and Zuni Reservations is prohibited except by special permit issued by the superintendent.

§ 252.24 Trade in Antiques Prohibited

Traders shall not deal in objects of antiquity removed from any historic or prehistoric ruin or monument on land owned or controlled by the United States.

§ 252.25 Imitation Indian Crafts Prohibited

It shall be forbidden for any person to introduce or have in his possession for disposition or sale to Indians or others, within the exterior boundaries of the forementioned reservations, any Indian arts and crafts, which are, according to established standards, imitation or spurious. Violators may be punished at the discretion of the superintendent.

§ 252.26 Sunday Trading

Traders shall not keep their places of business open on Sundays. However, this shall not be construed as prohibiting traders from accommodating travelers or Indians coming from a distance to trade in case of emergency.

§ 252.27 Purchase of Annuities and Gratuities Goods Prohibited

Traders are forbidden to buy, trade for, or have in their

possession any annuity or other goods of any description which have been purchased or furnished by the Government for the use or welfare of the Indians. Livestock or their increase purchased by the Government and in possession or control of the Indians, may not be purchased by any trader, not a member of the tribe to which the owners or possessors of the livestock belong, except by special permit issued by the superintendent.

§ 252.27a Amusement Companies

All carnival companies, circuses, theatrical companies, all persons, firms or companies conducting or operating portable dance pavilions, mechanical devices such as ferris wheels, carousels, or other devices for carrying passengers, and all persons operating games of skill, shall be considered traders and shall be required to obtain a license and to pay such fees as may be prescribed by the superintendent in charge of the jurisdiction, based on the number and class of devices or units to be operated (not less than $5.00 nor more than $25.00 per unit); and shall post a surety bond in an amount not exceeding $10,000.00 and a personal injury and property damage liability bond of not less than $500.00 nor more than $20,000 as may be required by the superintendent.

§ 252.27b Peddlers

All itinerant peddlers or purveyors of foodstuffs or other merchandise shall be considered traders and shall be required to obtain a license or permit from the superintendent setting forth the class of trade or peddling to be carried on; shall pay such fee as may be prescribed by the superintendent, and shall post such surety bond (not less than $500.00 nor more than $10,000.00) as may be required by the superintendent.

§ 252.27c Fees of Governing Body

The fees prescribed by these regulations shall not be considered as precluding the governing body of any Indian res-

ervation or Pueblo from assessing and collecting such fees, etc., as it may deem appropriate.

§ 252.28 Amendments

The regulations in this part are subject to change and addition with reasonable notice, at the discretion of the Commissioner of Indian Affairs. The trader is subject to revocation of license, and forfeiture in whole or in part of bond in the event of any violation of the regulations in this part.

Arizona Enabling Act, § 20, Second, 36 Stat. 569

Second. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said State shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein, or in the ordinance herein provided for, shall preclude the said State from taxing as other lands and other property are taxed any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be

exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

Arizona Constitution, Article XX, Fourth and Fifth

Fourth. The people inhabiting this State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes, the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that, until the title of such Indian or Indian tribes shall have been extinguished, the same shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Fifth. The lands and other property belonging to citizens of the United States residing without this State shall never be taxed at a higher rate than the lands and other property situated in this State belonging to residents thereof, and no taxes shall be imposed by this State on any lands or other property within an Indian Reservation owned or held by any Indian; but nothing herein shall preclude the State from taxing as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid, or as may be granted or confirmed to any Indian or Indians under any act of Congress. As amended, election May 31, 1927, eff. June 27, 1927.

Arizona Revised Statutes

§ 42-1301

In this article, unless the context otherwise requires:

* * *

2. "Business" includes all activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales.

6. "Engaging", when used with reference to engaging or continuing in business, includes the exercise of corporate or franchise powers.

• • •

8. "Gross proceeds of sales" means the value proceeding or accruing from the sale of tangible personal property without any deduction on account of the cost of property sold, expense of any kind, or losses, but cash discounts allowed and taken on sales shall not be included as gross income.

• • •

11. "Person" or "company" includes individual, firm, partnership, joint adventure, association, corporation, municipal corporation, estate, trust or any other group or combination acting as a unit, and the plural as well as the singular number.

• • •

13. "Sale" means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional or otherwise, in any manner or by any means whatever, of tangible personal property, for a consideration, and includes:

(a) Any transaction whereby the possession of property is transferred but the seller retains the title as security for the payment of the price.

(b) The fabrication of tangible personal property for consumers who furnish either directly or indirectly the materials used in the fabrication work and the furnishing, preparing or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing or serving such tangible personal property.

14. "Sale at retail" means a sale for any purpose other than for resale in the form of tangible personal property, but "transfer of possession", "lease" and "rental" as used in the definition of "sale" means only such transactions as are found upon investigation to be in lieu of sales as defined without the words "lease or rental."

15. "Tangible personal property" means personal property which may be seen, weighed, measured, felt, touched or is in any other manner perceptible to the senses.

§ 42-1305 Rule Making Power of Commission

The commission is authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this article.

§ 42-1308

A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. Licensees operating on March 24, 1954, shall be deemed to have complied with the provisions of this section.

* * *

F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days. As amended Laws 1956, Ch. 98, § 1.

§ 42-1309

A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities, and in the amounts to be determined by the application of rates against values, gross proceeds of sales,

or gross income, as the case may be, in accordance with the schedules as set forth in §§ 42-1310 through 42-1313.

§ 42-1312

A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, but the tax shall not apply to the gross proceeds of sales or gross income from:

1. The sale of stocks and bonds.

2. Professional or personal service occupations, or businesses which involve sales or transfers of tangible personal property only as inconsequential elements thereof.

3. Services rendered in connection with or in addition to the sale of tangible personal property at retail by businesses or occupations other than those to which subdivisions (a) through (h) of paragraph 2 of § 42-1310 and § 42-1311 are applicable.

Arizona Tax Commission Regulation 2.18.5

Trading Posts on Indian Reservations. A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction.

APPENDIX B

Papago Tribal Council Ordinances and "No Objection" Letters

ORDINANCE No. 43

WHEREAS, the State of Arizona has no jurisdiction to impose a sales tax (transaction privilege tax) on sales between Traders located on the Papago Indian Reservation and Indians, and

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the welfare of the Tribe, and

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three per cent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to make this tax applicable in all instances where the previous sales tax imposed by the State of Arizona applied. The *Arizona Revised Statutes* § *42-1301*, § *42-1347* shall be used as a reference in determining the applicability of the sales tax in question on

the Papago Reservation. The Arizona Revised Statutes are used solely for the purpose of illustration and reference and not adopted as such.

Section 3. Each of the Traders shall withhold from the total tax collected three per cent (3%) for the purpose of remitting said three per cent (3%) to the State of Arizona in compliance with the Arizona Revised Statutes covering transaction privilege taxes. The remaining ninety-seven percent (97%) of the total tax collected shall be forwarded by each of the Traders to the Papago Tribe, the collection period to be each and every calendar month with payment of the tax to the Tribe on or before the 15th day of the month following the collection period.

Section 4. It is the intention of this ordinance to comply with the law of the State of Arizona where applicable. Therefore, the three per cent (3%) that will be sent to the State of Arizona represents that proportion of non-Indian business that is transacted with the Traders on the reservation.

Section 5: It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 6. The effective date of this ordinance is July 1, 1963.

Section 7. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 8. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 9. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules and regu-

lations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 10. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 12th day of July, 1963, duly enacted by a vote of 17 for, 0 against, and 5 not voting, by the Papago Council, pursuant to authority vested in it by Section 3 (a), Section 3 (d), Section 3 (e) and Section 3 (h) of Article V of the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of the Interior on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Stat. 984). Said ordinance is effective as of July 1, 1963 after its approval by the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6, Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL

By: Eugene J. Johnson
Eugene J. Johnson, Tribal Chairman

ATTEST:
Mary Jane Vasquez
Tribal Treasurer

APPROVED:
July 22, 1963

(Sgd.) Martin J. Steinwand
Acting Superintendent
Thomas H. St. Clair, Superintendent.

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON 25, D. C.

In Reply Refer to:
Law and Order
5910-63
Oct. 11, 1963

Through: Area Director, Phoenix
Mr. Eugene J. Johnson
Chairman, Papago Council

Dear Mr. Johnson:

On July 12, 1963, the Papago Council enacted Ordinance No. 43 for the purpose of imposing a sales tax on goods sold within the Papago Reservation. Pursuant to Section 6, Article V, of the tribal constitution, the ordinance is subject to review by the Secretary of the Interior.

The ordinance provides for imposition of a 3% sales tax on traders doing business on the reservation. It is patterned after the laws of Arizona. The council has estimated that 97% of the business of traders on the reservation is with Indian people and the remaining 3% is with non-Indians. The ordinance provides, therefore, that 97% of the taxes withheld by the traders shall be payable to the tribe, and that the remaining 3% may be paid to the state.

Pursuant to the authority delegated by Secretarial Order No. 2508, as amended (19 F. R. 4585), we have carefully reviewed Ordinance No. 43 and find no reason which would prompt us to recommend its rescission by the Secretary of the Interior. Ordinance No. 43 is in full force and effect, therefore, as of the date of the Superintendent's approval.

The purpose and intent of the ordinance could be more clearly stated. This matter has been discussed by telephone recently with

Mr. Edward B. Berger, tribal attorney, and we understand he will suggest that a clarifying ordinance be enacted by the council.

The original of Ordinance No. 43 is returned.

Sincerely yours,

Enclosure

Commissioner

ORDINANCE No. 44

WHEREAS, by Act of Congress of March 3, 1901 as amended by the Act of March 3, 1903 (25 U.S.C. 261-262) the Commissioner of Indian Affairs has the sole power and authority to appoint Traders to the Indian Tribes and make rules and regulations for, among other things, the prices at which goods may be sold to Indians and thereby pre-empting the field of retail sales to Indians upon the Papago Indian Reservation. as against the Arizona transaction privilege tax, and

WHEREAS, Article V of the Constitution of the Papago Tribe provides for the passage of necessary ordinances that are essential to the Welfare of the Tribe, and

WHEREAS, it is necessary to meet the financial needs of the Papago Tribe,

NOW, THEREFORE, be it enacted by the Papago Council that the following sales tax (transaction privilege tax) be adopted:

Section 1. A sales tax is hereby enacted upon the gross receipts of all sales made within the confines of the Papago Reservation in the amount of three percent (3%) of every dollar transacted.

Section 2. It is the intention of this ordinance to be applicable to all business activities or acts, personal or corporate, engaged in or caused to be engaged in with the object of gain, profit or advances, whether directly or indirectly by all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers.

Section 3. The effective date of this ordinance is October 21, 1963.

Section 4. The administration of this Article is vested in and shall be exercised by the Papago Tribal Council by and through the Administrative Assistant to the Papago Tribe. All payments shall be made to the Papago Tribe.

Section 5. The enforcement of this Article may be had in the Tribal Courts or any other Court of competent jurisdiction.

Section 6. The Tribal Chairman and Administrative Assistant are authorized and directed to formulate rules and regulations and prescribe forms and procedure necessary to the efficient enforcement of this Article.

Section 7. Any previous provisions, ordinances or resolutions in conflict with this ordinance are hereby rescinded.

The foregoing ordinance was on the 11th day of October, 1963 duly enacted by a vote of 15 for and 0 against by the Papago Council, Pursuant to authority vested in it by Section 3(a), Section 3 (d), Section 3 (e) and Section 3 (h) of Article V of the Constitution of the Tribe, ratified by the Tribe on December 12, 1936 and approved by the Secretary of the Interior on January 6, 1937, pursuant to Section 16 of the Act of June 18, 1934 (48 Star. 984). Said ordinance is effective as of October 21, 1963 after its approval of the Superintendent of the Papago Agency, subject to its rescission by the Secretary of the Interior pursuant to Section 6 Article V of the Constitution and By-Laws of the Papago Tribe.

THE PAPAGO COUNCIL

By: Eugene J. Johnson
Eugene J. Johnson, Tribal Chairman

ATTEST:
Claudina R. Chavez
Claudina R. Chavez, Secretary

APPROVED:
October 21, 1963.
Thomas H. St. Clair
Thomas H. St. Clair, Superintendent

B7

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
WASHINGTON 25, D. C.

In Reply Refer to:
Law and Order
7937-63

Dec. 9, 1963

Through: Area Director, Phoenix
Mr. Eugene J. Johnson
Chairman, Papago Council

Dear Mr. Johnson:

On October 11, 1963, the Papago Council enacted Ordinance No. 44 for the purpose of imposing a sales tax on goods sold within the Papago Reservation. Pursuant to Section 6, Article V, of the tribal constitution, the ordinance is subject to review by the Secretary of the Interior.

The ordinance provides for an imposition of a 3% tax upon the gross receipts of all sales made within the confines of the Papago Reservation. It also provides that all resolutions, ordinances, or other provisions in conflict with the provisions of Ordinance No. 44 are rescinded. On October 11, 1963, we favorably reviewed Ordinance No. 43, enacted by the council on July 12, 1963, which also provided for the imposition of a sales tax on goods sold within the reservation. Certain provisions of Ordinance No. 43 which appeared unclear were discussed with Mr. Edward B. Berger, tribal attorney, before favorable review was given to this ordinance, and it was suggested that a clarifying ordinance be enacted by the council. Ordinance No. 44 was enacted to clarify the previous ordinance.

Section 2 of the ordinance provides that it is applicable to all business activities of "all Traders, Peddlers, Dealers or Canvassers as the agent of Dealers, Supervisors or Employers." We construe

this language to mean that the ordinance is applicable to traders, peddlers, dealers or canvassers *individually or as agents* of dealers, supervisors or employers. On this understanding, and pursuant to the authority delegated by Secretarial Order No. 2508, as amended (19 F.R. 4585), we have reviewed Ordinance No. 44 and find no reason which would prompt us to recommend its rescission by the Secretary of the Interior.

The original of Ordinance No. 44 is returned.

Sincerely yours,
(Sgd) John O. Crow
Deputy Commissioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY, a Corporation,
Appellant,

v.

THE ARIZONA STATE TAX COMMISSION, THAD D. MOORE, WARREN PETERSON and W. E. STANFORD, as members of the Arizona Tax Commission, *Appellees.*

BRIEF ON BEHALF OF ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., HUALAPAI TRIBE OF ARIZONA, SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY, AND SAN CARLOS APACHE TRIBE OF ARIZONA, AS AMICI CURIAE

Counsel for the parties have consented in writing to the filing of a brief in the above-entitled case on behalf of the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Salt River Pima-Maricopa Indian Community and the San Carlos Apache Tribe of Arizona, as *amici curiae.*

INTEREST OF AMICI CURIAE

The Association on American Indian Affairs is a non-profit, membership corporation, organized under the laws of the State of New York, which is primarily devoted to safeguarding the rights and promoting the welfare of American Indians. The Hualapai Tribe, the Salt River Pima-Maricopa Indian Community and the San Carlos Apache Tribe are recognized tribes of American Indians, all organized under Section 16 of the Act of June 18, 1934, 48 Stat. 984, 987, 25 U.S.C. 476, which have a combined population of about 6,200 and which occupy reservations totalling about 2,900,000 acres within the State of Arizona.

The interest of the Association and the three Arizona tribes in the instant proceeding is to assist this Court in determining whether a State lawfully may impose a tax upon a non-Indian trader for the privilege of doing business with Indians within an Indian reservation. More specifically, the object of this brief of *amici curiae* is to demonstrate that the Arizona privilege tax, to the extent so assessed: (1) places a burden upon commerce with Indian tribes in violation of Article I, Section 8, Clause 3 of the United States Constitution; and (2) interferes illegally with the exercise by Indian tribes of their inherent powers of local self-government.

The interest of the Association and the three Arizona tribes in the validity of the State privilege tax as applied to non-Indian traders also reflects a deep concern over its practical effect upon the reservation economy. American Indians generally, and the Indians of Arizona in particular, are today, as they have been for years, at the very bottom of the economic scale in

the United States.[1] Indeed, according to recent statistics compiled by the Bureau of Indian Affairs, the average median family income for all Arizona reservations still amounts to only $1,357 annually, and 49% of the Indian work force within the State is unemployed. For people so immersed in poverty, a privilege tax measured by gross sales which obviously is passed on through higher prices to the ultimate consumer has direct impact and costly consequences.

STATEMENT OF THE FACTS

The facts in this case are not in dispute. Appellant, Warren Trading Post Company, is an Arizona corporation licensed by the Commissioner of Indian Affairs under the Act of August 15, 1876, 19 Stat. 200, 25 U.S.C. 261, to do business at Kayenta on the Navajo Indian Reservation in Navajo County, Arizona (T.R. 4-5). Appellant leases land from the Navajo Tribe and, among other activities, engages thereon in the retail sale of personal property to Indians.

---

[1] *Health Services for American Indians*, Public Health Service Publication No. 531 (GPO, 1957); pp. 26-7, 30-2; Meriam, *The Problem of Indian Administration* (Johns Hopkins Press, 1928), pp. 4, 448. In a speech delivered in the House of Representatives on August 14, 1951, the Hon. Frank T. Bow, a member of the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, reported: "The average Indian family cash income is $1,324 per year. * * * In matters of income it can be easily seen that the Indians as a whole constitute one of the lowest level groups in the United States." 97 Cong. Rec. 9993 *et seq.* Of the ten Arizona Indian groups for which average *family* incomes in 1950 were given in the appendix to the speech, nine were below the national average for Indians, and eight showed an average family income below $1,000. These figures should be contrasted with the estimate of the Department of Commerce that in 1950 the average *per capita* income of all individuals in Arizona was $1,240. 1952 *World Almanac* at 674.

Appellees, the Arizona State Tax Commission and its individual members, have asserted that appellant is subject to the provisions of the Arizona Transaction Privilege Act which requires every person within the State who receives gross proceeds of sale or gross income from sales to obtain a license for a fee of $1.00. Arizona Revised Statutes § 42-1308. Appellees have further assessed against Warren Trading Post Company a tax under Arizona Revised Statutes § 42-1312 and Commission Regulation 2.18.5 measured by an amount equal to two per cent of its gross sales of tangible personal property at retail (T.R. 6).[2] The State tax, the parties agree, is a privilege tax imposed upon the seller for the privilege of engaging in business and is not a sales tax imposed upon the purchaser. *Arizona State Tax Commission* v. *Garrett Corp.*, 79 Ariz. 389, 291 P. 2d 208 (1955); see Appellant's

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[2] Arizona Revised Statutes § 42-1312 provides in material part:

> "A. The tax imposed by subsection A of § 42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail, . . ."

Arizona State Tax Commission, Combined Privilege Sales and Use Tax Regulation 2.18.5 provides

> "*Trading Posts on Indian Reservations.* A person operating a commissary or trading post on an Indian reservation, under an agreement or license with the Indian agency, is subject to the tax levied upon retail sales. All proceeds of sales from whatever source derived are subject to the Transaction Tax upon the operator of the trading post making the sale. The vendor is subject to the Transaction Tax on gross proceeds of sales made to Indians residing on the reservation as well as off the reservation. Sales directly to the Federal Government are subject to 50% deduction."

Jurisdictional Statement, p. 11 and Appendix A therein, p. 2.

On August 26, 1958, Warren Trading Post Company filed suit in the Superior Court of Arizona for Maricopa County seeking a declaratory judgment that the application of the Arizona Transaction Privilege Act to retail sales of personal property by an Indian trader to Indians within the Navajo Indian Reservation is unlawful and invalid (T.R. 4-12). The Superior Court ruled against the taxpayer (Appellant's Jurisdictional Statement, Appendix B), and the Arizona Supreme Court affirmed that decision upon appeal. *Warren Trading Post Company* v. *Moore,* 95 Ariz. 110, 387 P. 2d 809 (1963). This court noted jurisdiction on October 12, 1964. 33 *Law Week* 3127.

QUESTION PRESENTED

The sole question presented in this case is whether the State of Arizona may require a license from and impose a tax upon a non-Indian trader for the privilege of selling personal property to Indians within an Indian reservation.

ARGUMENT

I. THE APPLICATION OF THE ARIZONA PRIVILEGE TAX TO MERCHANTS DOING BUSINESS WITH INDIANS ON INDIAN RESERVATIONS VIOLATES THE CONSTITUTION AND LAWS OF THE UNITED STATES.

A. Article I, Section 8, Clause 3 of the Constitution Vests in the Federal Government an Exclusive Right to Regulate and Control Commerce With Indian Tribes.

The power of Congress to regulate commerce with Indian tribes has been described as "paramount and of a most sweeping character." *People ex rel. Ray* v. *Martin,* 294 N.Y. 61, 60 N.E. 2d 541 (1945), affirmed

326 U.S. 496 (1946). The broad scope of the power, expressed in Article I, Section 8, Clause 3 of the Constitution, stems from a recognized need in the early days of our country to develop a uniform, nationwide policy in the conduct of Indian affairs. As explained by this Court in *United States* v. *Forty-three Gallons of Whiskey,* 93 U.S. 188 (1876) at 194:

> "Under the Articles of Confederation of 1777, two limitations were placed upon the power of Congress over Indian affairs: the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits. Of necessity, these limitations rendered the power of no practical value. This was seen by the Convention which framed the Constitution; and Congress now has the exclusive and unfettered power to regulate commerce with the Indian Tribes, a power as broad as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government."

As the foregoing quotation illustrates, the Indian commerce clause sometimes has been called "a power as broad as that to regulate commerce with foreign nations." *United States* v. *Forty-three Gallons of Whiskey, supra; Dick* v. *United States,* 208 U.S. 340, 356 (1908); *Perrin* v. *United States,* 232 U.S. 478, 484 (1914). On other occasions, the power of Congress to regulate commerce with Indian tribes has been said to be "not less than its power over commerce among the states." *Hanley* v. *Kansas City S.R. Co.,* 187 U.S. 617, 619 (1903). Regardless of the characterization employed, this Court in each such case has ruled that

Article I, Section 8, Clause 3 vests an exclusive power in Congress to regulate commerce with Indian tribes and precludes regulation by any State.

Commerce with Indian tribes means commerce with the individuals who compose those tribes. *United States* v. *Holliday,* 3 Wall. (U.S.) 407, 417 (1866); *United States* v. *Nice,* 241 U.S. 591 (1916). In this case, the State of Arizona is requiring a State license from, and imposing a tax upon, merchants for the privilege of doing business with Indians on an Indian reservation. The Arizona Transaction Privilege Act, as so applied, regulates trade with an Indian tribe and, therefore, clearly contravenes the Indian commerce clause of the Federal Constitution. Cohen, *Federal Indian Law* (Interior Department Revision, 1958), pp. 867-73; 57 Decisions of the Department of the Interior 124 (1940), confirmed in 58 Decisions of the Department of the Interior 562 (1943).

B. The State's Assessment of a Tax Against Reservation Traders for the Privilege of Selling Personal Property to Indians Constitutes an Unlawful Burden on Commerce With Indian Tribes.

The court below rationalized application of the Arizona privilege tax to sales on Indian reservations by analogy to the cases in which this Court has sustained State taxes which have only an incidental effect upon interstate commerce. *Warren Trading Post Company* v. *Moore,* 95 Ariz. 110, 387 P. 2d 809, 814 (1963). In formulating this thesis, the Arizona Supreme Court wholly ignored the vital distinction between taxes which fairly compensate a State for local benefits and taxes which directly interfere with the free flow of commerce. One clear rule which may be

deduced from this Court's decisions construing Article I, Section 8, Clause 3, is that privilege taxes—such as the Arizona Transaction Privilege Act—measured by gross receipts and not apportioned to reflect local services provided the taxpayer by the taxing State, are unconstitutional. *Railway Express Agency, Inc.* v. *Virginia,* 347 U.S. 359 (1954); *Joseph* v. *Carter & Weeks Stevedoring Co.,* 330 U.S. 422 (1947); *Puget Sound Stevedoring Co.* v. *State Tax Commission,* 302 U.S. 90 (1937).

Upon analysis, the Arizona privilege tax, as imposed upon traders with Indians on Indian reservations, seems to embody all the evils which have caused this Court to invalidate State revenue statutes applied to interstate activities. The Arizona Transaction Privilege Act, for example, attempts to regulate commerce with Indian tribes by requiring a State license for, or payment of a tax upon, the privilege of doing business, practices held illegal when applied to interstate commerce in *Memphis Steam Laundry* v. *Stone,* 342 U.S. 389 (1952), *Spector Motor Service Co.* v. *O'Connor,* 340 U.S. 602 (1951), and *Robbins* v. *Taxing District of Shelby County,* 120 U.S. 489 (1887). The Arizona privilege tax is measured by gross receipts, a basis for assessing taxes held to create an unlawful burden upon interstate and foreign commerce, respectively, in *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307 (1938), and *Crew Levick Co.* v. *Pennsylvania,* 245 U.S. 292 (1917). Finally, the Arizona Transaction Privilege Act violates the commerce clause by failing to apportion the tax in reasonable relationship to the local benefits, if any, which the State provides

the taxpayer.[3] *Central Greyhound Lines* v. *Mealey*, 334 U.S. 653 (1948); *Freeman* v. *Hewit*, 329 U.S. 249 (1944); cf. *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938).

The court below further cites *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598 (1943), as authority for the proposition that Congress has not immunized Indian reservations from the application of State excise taxes. While holding therein that a State inheritance tax may be assessed against the restricted personal property of Indians, this Court carefully pointed out that Oklahoma tribes are not "separate political entities with all the rights of independent status" and "have no effective tribal autonomy" (319 U.S. at 602-3),[4] that Oklahoma Indians have the resources to pay estate taxes (319 U.S. at 609, fn. 13), and that the State of Oklahoma provides its Indian citizens with services furnished elsewhere by the Federal Government (319 U.S. at 609). *Oklahoma Tax Commission* v. *United States*, *supra*, therefore, is hardly precedent for sanctioning the application on an Arizona reservation of a regressive State excise tax which is passed on to rich

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[3] The tribes involved and the United States furnish virtually all governmental services on Indian reservations in Arizona. A more detailed treatment of this subject, and the manner in which the State privilege tax exposes traders in Indian country to the risks of multiple taxation, appears at pp. 14, 15, *infra*.

[4] Compare *United States* v. *Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876) at 195 as follows:

> "As long as the Indians remain a distinct people, with existing tribal organizations, recognized by the Political Department of the Government, Congress has the power to say with whom, and on what terms they shall deal, and what articles shall be contraband."

and poor Indian buyers alike, which produces revenue not returned in State services, and which imposes a direct burden on commerce with existing Indian tribes.[5]

C. The Federal Government Has Pre-empted the Field of Licensing Non-Indian Traders on Indian Reservations.

In accordance with Article I, Section 8, Clause 3 of the Constitution, Congress has exercised an authority to regulate commerce with Indian tribes. Specifically, Section 5 of the Act of August 15, 1876, 19 Stat. 200, 25 U.S.C. 261, provides:

> "The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians."

Other statutes empower the Commissioner of Indian Affairs, under such rules and regulations as he may prescribe, to permit persons "to trade with the Indians on any Indian reservation,"[6] allow the President "to prohibit the introduction of goods, or any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe

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[5] Equally inapposite is *Thomas* v. *Gay*, 169 U.S. 264 (1898), where a State tax levied against the personal property of a non-Indian within an Indian reservation was upheld. In the *Thomas* case, this Court found that "a tax put upon the cattle of the lessees is too remote and indirect to be deemed a tax upon the lands or privileges of the Indians" (169 U.S. at 273). Although imposed upon non-Indian traders, the State tax at issue herein obviously is passed on through higher prices to Indian consumers.

[6] Act of March 3, 1901, 31 Stat. 1066, as amended by the Act of March 3, 1903, 32 Stat. 1009, 25 U.S.C. 262.

to be revoked,'"[7] and provide criminal penalties for any person "other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein," without the required Federal license.[8]

Read together, the foregoing laws evidence a comprehensive Congressional scheme to control trade with Indians on Indian reservations through officers of the United States.[9] So total is the Federal occupation of the field that any State legislation affecting commerce with Indian tribes in Indian country, including the Arizona Transaction Privilege Act, is *prima facie* invalid under the doctrine of pre-emption.[10]

Indeed, the statutory program of the Federal Government for regulating traders doing business with Indians on Indian reservations satisfies all the tests for barring the application of State law approved by this Court in *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956), and *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S.

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[7] R.S. § 2132, 25 U.S.C. 263.

[8] R.S. § 2133, as amended by the Act of July 31, 1882, 22 Stat. 179, 25 U.S.C. 264.

[9] Complete regulations governing licensed Indian traders are set out in 25 C.F.R. Part 251. Special regulations governing traders on the Navajo, Zuni and Hopi Reservations are set out in 25 C.F.R. Part 252.

[10] Where, as in this case, a direct conflict exists between a State statute and a Federal statute within the power of Congress to enact, the doctrine of pre-emption is unnecessary. *Kelly* v. *Washington*, 302 U.S. 1, 9 (1937); see also *Sperry Oil and Gas Co.* v. *Chisholm*, 264 U.S. 488 (1924). The discussion which follows assumes, solely for the sake of argument, that no such conflict is here present.

218 (1947). First, the scheme of Federal regulation on its face is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, as would be the case if Arizona's licensing requirement were sustained. Secondly, the Federal statutes occupy an area in which the interest of the United States is so dominant that the Constitution must be assumed to preclude enforcement of State laws relating to the same subject. *Williams* v. *Lee,* 358 U.S. 217 (1959); *Creek County* v. *Seber,* 318 U.S. 705 (1943); *United States* v. *Kagama,* 118 U.S. 375 (1886); *The Kansas Indians,* 5 Wall. (U.S.) 737 (1867). Thirdly, enforcement of the Arizona Transaction Privilege Act presents a serious danger of conflict with the Federal program of fostering tribal self-government. Point II, *infra.*

Under the circumstances, even if the Indian commerce clause did not directly prohibit a State from imposing a tax upon the privilege of doing business with Indians on an Indian reservation, Congress under the doctrine of pre-emption has precluded application of the Arizona Transaction Privilege Act to non-Indian merchants in Indian country by adopting a comprehensive Federal statutory scheme for licensing Indian traders and otherwise regulating commerce with Indian tribes.

II. THE IMPOSITION OF THE ARIZONA PRIVILEGE TAX UPON MERCHANTS DOING BUSINESS WITH INDIANS ON INDIAN RESERVATIONS CONSTITUTES AN ILLEGAL INTERFERENCE WITH TRIBAL SOVEREIGNTY.

Indian tribes early were recognized as distinct, independent political communities in which the laws of a State could have no force and which its citizens had no right to enter. *Worcester* v. *Georgia,* 6 Pet. (U.S.) 515, 559-61 (1832). "Over the years this

Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of Worcester has remained." *Williams* v. *Lee,* 358 U.S. 217, 219 (1959). The test of whether a State statute may be enforced upon an Indian reservation is "whether the application of that law would interfere with reservation self-government." *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 67-8, 75 (1962); *Williams* v. *Lee, supra,* at 220.

The power to levy taxes is an inherent attribute of tribal sovereignty and, except as limited by treaty or act of Congress, properly may be exercised over non-Indians doing business within the exterior boundaries of Indian reservations. *Iron Crow* v. *Oglala Sioux Tribe,* 231 F. 2d 89, 98-9 (C.A. 8, 1956); *Buster* v. *Wright,* 135 Fed. 947 (C.A. 8, 1905), appeal dismissed 203 U.S. 599 (1906); *Morris* v. *Hitchcock,* 21 App. D.C. 565 (1903), affirmed 194 U.S. 384 (1904); Cohen, *Federal Indian Law* (Interior Department Revision, 1958), pp. 345-39; 55 Decisions of the Department of the Interior 14, 46-8. The Federal Government has not exempted licensed traders on Indian reservations from tribal taxes. Indeed, far from restricting the taxing powers of Indian tribes, the United States during recent years actually has encouraged and assisted Indians to assume ever increasing responsibilities for the management, conduct and support of their local government.[11] *Williams* v. *Lee, supra,* at 222; *Iron Crow* v. *Oglala Sioux Tribe, supra,* at 99.

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[11] The power of the Hualapai and San Carlos Apache Indians to "levy and collect taxes" is expressly confirmed in tribal constitutions adopted pursuant to the Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. 476.

The Arizona Transaction Privilege Act, as applied to merchants selling personal property to Indians within an Indian reservation, necessarily conflicts with any tax the tribe having jurisdiction over that area might impose upon the same activity.[12] If both taxes are assessed, the added cost of doing business either will be absorbed by the seller or, more likely, will be passed on through higher prices to the Indian buyers. In the latter event, many consumers will purchase as much tangible personal property as possible off the reservation, thus frustrating collection of the tribal (but not the State) tax. In the former event, lower profit margins will inhibit the establishment or increase of trade within the reservation, again resulting in less revenue to the tribe.[13]

In addition to reducing tribal tax receipts, the Arizona Transaction Privilege Act also siphons substantial funds completely out of the reservation economy. Under Arizona Revised Statutes § 42-1309, income derived from the privilege tax is

> ". . . to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education. . . ."

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[12] The Papago Tribe of Arizona, for example, recently approved a tax of 3% upon the gross receipts from sales made within its reservation.

[13] Tribal income would be further cut to the extent rentals for premises leased to traders are measured by gross receipts or net profits.

On Indian reservations in Arizona, the State and counties do not furnish public school education for Indian children, provide health and medical services, build roads, maintain law and order or otherwise assume or incur any significant expenses of local government. Moreover, if an Indian on the reservation fails to pay for goods purchased, the seller may not even invoke State court process to collect the debt. *Williams* v. *Lee, supra.* By imposing the privilege tax upon reservation traders, therefore, appellees are collecting revenue to pay for services which the State does not actually perform.[14]

On repeated occasions in interstate commerce cases, this Court has invalidated actual or potential double taxation. *Railway Expenses Agency, Inc.* v. *Virginia,* 347 U.S. 359, 367-68 (1954); *Freeman* v. *Hewit,* 329 U.S. 249, 256-57 (1946); *J. D. Adams Mfg. Co.* v. *Storen,* 304 U.S. 307, 311-12 (1938). The Arizona Transaction Privilege Act, as applied to merchants selling personal property to Indians within an Indian reservation, is double taxation in classic form—an unapportioned levy assessed against activity over which another sovereign has taxing jurisdiction. In competition with the right of tribes to impose taxes within their own reservations, the State tax must fall.

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[14] The privilege tax is intended "to reduce or eliminate the annual tax levy on property. . . ." Arizona Rev. Stats. § 42-1309. The State of Arizona, of course, has disclaimed the right to tax tribal land within an Indian reservation. Act of June 20, 1910, 36 Stat. 557, 568, 569-70.

CONCLUSION

On the basis of the foregoing discussion, the conclusion is inescapable that the Arizona Transaction Privilege Act, as applied to non-Indian traders doing business with Indians on an Indian reservation: (1) places a direct burden upon commerce with Indian tribes in violation of Article I, Section 8, Clause 3 of the Constitution and the laws of the United States; and (2) interferes illegally with the exercise by Indian tribes of their inherent powers of local self-government. Accordingly, the Association on American Indian Affairs, Inc., the Hualapai Tribe of Arizona, the Salt River Pima-Maricopa Indian Community, and the San Carlos Apache Tribe of Arizona, as *amici curiae,* urge that the judgment of the Arizona Supreme Court upholding imposition of the State privilege tax be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 115

WARREN TRADING POST COMPANY, APPELLANT

v.

ARIZONA STATE TAX COMMISSION, ET AL.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

MEMORANDUM FOR THE UNITED STATES

In the memorandum filed by the United States urging review of the decision of the Supreme Court of Arizona, we set out, in summary form, our reasons for believing that the Arizona tax was in conflict with the Commerce Clause of the United States Constitution and with the statutes enacted by Congress dealing with trading with the Indians. The appellant and the *amici* supporting appellant's position have developed these arguments fully in their briefs. We therefore believe it unnecessary for the government to expand upon the arguments stated in our prior memorandum, merely to emphasize our belief in the correctness of

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appellant's position and the importance of the considerations urged.

In its prior memorandum, the government did not, however, refer to this Court's decision in *Williams* v. *Lee,* 358 U.S. 217, which we believe provides an additional and sufficient ground for overturning the decision below. In *Williams* the Court noted that the starting-place for a determination of the scope of State jurisdiction over Indian tribes is *Worcester* v. *Georgia,* 6 Pet. 515, 561, where Chief Justice Marshall wrote for the Court that "The Cherokee nation * * * is a distinct community, occupying its own territory * * * in which the laws of Georgia can have no force * * *. The whole intercourse between the United States and this nation is, by our constitution and laws, vested in the government of the United States." The Court noted in *Williams* that these principles have been somewhat modified over the years but "the basic policy of *Worcester* has remained. * * * Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 219–220. Finally, the Court noted that Congress, too, has assumed that the States have no "power to regulate the affairs of Indians on a reservation"; for example, in enacting comprehensive federal statutes regulating trade with Indians. *Ibid.*

The exclusive power to tax transactions with Indians occurring on an Indian reservation is, we believe, a necessary concomitant of the reserved power

of the Indian tribe to govern itself, absent contrary federal statutes. While Congress has allowed the States to assume other prerogatives of sovereignty over Indian tribes, significantly, no statute has ever ceded the States a power to tap the resources necessary for the operations of government on the reservation. Indian self-government cannot be a meaningful enterprise if the power of the tribe to tax transactions with Indians on the reservation is drained by duplicate State taxation of the very same transactions.

We, therefore, believe that the decision below should be reversed, not only for the reasons we have previously stated, but also because of the dispositive effect of this Court's opinion in *Williams* v. *Lee*. The language of the Court's concluding paragraph is controlling here. "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there. Cf. *Donnelly* v. *United States, supra; Williams* v. *United States, supra*. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. * * *"

Respectfully submitted.

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BRIEF OF THE NAVAJO TRIBE OF INDIANS, AS AMICUS CURIAE

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Pursuant to Rule 42(2) and the written consent of the parties hereto, The Navajo Tribe of Indians files this brief as *amicus curiae*.

INTEREST OF AMICUS CURIAE

As *amicus curiae* The Navajo Tribe of Indians associates itself with the position of and adopts by reference the question presented, statement, and the arguments advanced by appellant in its brief, *i.e.*, (1) that the imposition of a state privilege tax on Indian com-

merce is violative of the commerce clause of the Constitution (Art. I, § 8, cl. 3), and (2) that Indian commerce is closed to state regulation because the field has been preempted by Congress by the enactment of a comprehensive system of federal law.

In addition, *amicus* sets forth certain specific facts not included in appellant's brief and which *amicus* believes to be relevant to the disposition of the question presented in this case.

ARGUMENT

I. The Arizona Privilege Tax and the Navajos

The impact of the privilege tax which the Navajo Tribe submits has been improperly sustained by the Supreme Court of Arizona would be much broader and more oppressive to members of the Tribe than appellant indicates. The 24,000-square mile Navajo Reservation, the largest in the United States, spreads over large portions of New Mexico and Utah, as well as Arizona.[1] Likewise, the population of the Navajo Tribe is spread throughout the Reservation portions of these three states.

The States of New Mexico and Utah have had privilege taxes since 1953,[2] but only after the decision of the Supreme Court of Arizona now under review has New Mexico undertaken to impose its privilege tax on Indian reservations.[3] Utah will undoubtedly do likewise.

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[1] The Navajo Yearbook, Report No. viii (U. S. Dept. of the Interior, 1961), p. v.

[2] N. M. Stat. 1953, ch. 72, art. 16; Utah Code Ann. 1953, tit. 59, ch. 15.

[3] See appellant's brief, p. 15, and n. 5.

What would be the effect on the Navajos? Because of the utter absence of street addresses and even of surveys in most of the vast—and largely wilderness—areas of the Navajo Reservation, the population of the Navajo Tribe is commonly believed to be substantially larger than the official count which the United States Bureau of the Census reported for 1960 as 80,364, of whom 45,663 were then estimated to reside in Arizona.[4]

There are 72 non-Indian licensed traders, plus 26 Navajo businessmen, in Arizona. Official reports of gross proceeds of sales by 52 of the Arizona licensed traders are available and they show a total of $6,778,409.36 for the year 1960.[5] If these gross receipts are projected to the total of the 72 Arizona licensed traders in the same ratio, the gross figure becomes $9,385,499. The two per cent tax undertaken to be imposed by Arizona Revised Statutes § 42-1312 therefore would have yielded $187,709.98, which would have meant an average tax burden of $4.11 for the 45,663 Navajos residing in Arizona.

Moreover, although not directly in issue in this case, there would be an *additional* tax should the appellee prevail. Arizona Revised Statutes § 42-1361, enacted by Arizona Laws 1959, Chapter 89, § 1, effective July 1, 1959, provided for an "education excise tax" equal to, by reference, 50 per cent of the amount imposed

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[4] The Navajo Yearbook, Report No. viii (U. S. Dept. of the Interior, 1961), p. 311.

[5] From ledger sheets in files of Tribal Trading Department of the Navajo Tribe, Window Rock, Arizona, maintained as a part of the official records in the administration of the Tribe's regulation of traders. See Navajo Tribal Code, tit. 5, ch. 9; tit. 13, ch. 3. (A set of this two-volume bound code is available in the Court's library.)

by § 42-1312, *i.e.*, one-half of that two per cent, thereby potentially producing a total of three per cent on the transactions which are the subject of this case. Again taking the 1960 gross receipts figure of $9,385,499, the combined *three* per cent rate would have yielded the State of Arizona a new sum of $281,564.97, instead of $187,709.98, and would have imposed a per capita tax burden of $6.16 instead of $4.11.[6]

Lest the foregoing figures be viewed as reflecting a burden of only a niggardly nature, they should be evaluated in the context of the average Navajo per capita cash income, including the value of free goods and services. Although this may be somewhat higher than that of other Indian tribes, the Navajo per capita income still was only $645 per year for 1960.[7]

In the majority opinion below it is said that "there is no suggestion arising out of the stipulated facts that the [Navajo] Indians are less able to pay this tax than other residents of Arizona *of a like or similar status*." (Italics added.) (J.S. A3. n. 7.) This negative statement not only is in itself not meaningful, but it completely ignores the federal legislative intent expressly spelled out *with respect to Indians* in the Navajo-Hopi Rehabilitation Act of April 19, 1950, c.

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[6] This presumes a pragmatic merchandising axiom that the Indian traders would be permitted by the Department of the Interior to pass the tax on to the Indian consumers.

[7] The Navajo Yearbook, Report No. viii (U. S. Dept. of the Interior, 1961), p. 228. These figures were compared with an average per capita income of $2,166 for the nation as a whole. "Even with inclusion of the value of free services, the average per capita income of Navajos in the Reservation area * * * is only 29.8% of the comparable amount received by fellow citizens of the United States." *Id.* at 229.

92, 64 Stat. 44, as amended, now 25 U.S.C. §§ 631-40, section 1 of which authorizes total appropriations of $108,570,000, in 14 enumerated areas of activity,

> * * * in order to further the purpose of existing treaties with the Navajo Indians, to provide facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization among the members of the Navajo and Hopi Tribes, to make available the resources of their reservations for use in promoting a self-supporting economy and self-reliant communities, and to lay a stable foundation on which these Indians can engage in diversified economic activities and ultimately attain standards of living comparable with those enjoyed by other citizens * * *.

In its explanation of the bill (S. 2734, 81st Cong., 2d sess.), the enactment of which had been proposed by the Department of the Interior, the House Committee on Public Lands said (H. R. Rep. 1474):

> The committee is convinced that a comprehensive long-range program for the rehabilitation of the Navajo and Hopi Tribes of Indians is essential. *The emergency relief appropriations of recent years have partially alleviated the desperate condition of these tribes but have not attacked the basic problem of helping them improve their economic and social status* in order that such periodic relief measures can gradually be reduced. (Italics added.)

Against this federal legislative history, the imposition of a *state* tax, whatever the rate, not only would constitute a pro tanto frustration of the objectives of provision for "facilities, employment, and services essential in combating hunger, disease, poverty, and demoralization" of the Navajos, and of their ultimate

attainment of "standards of living comparable with those enjoyed by other citizens," but it would be conducive to a retrogression from their present "economic and social status."

The foregoing is not inconsistent with the potential imposition of a sales or transaction privilege tax, with the approval of the Secretary of the Interior, by the Navajo Tribal Council itself, directly to assist in meeting the Tribe's own financial needs. As stated by Mr. Justice Black in *Williams* v. *Lee*, 358 U.S. 217, 221-222, "implicit in these [1868] treaty terms, as it was in the treaties involved in *Worcester* v. *Georgia*, was the understanding that *the internal affairs of the* [Navajo] *Indians remained exclusively within the jurisdiction of whatever tribal government existed.*" (Italics added.)

II. Invasion of the Tribe's Regulation of Traders Using Tribal Lands

The Navajo Tribe, with the approval of the Department of the Interior, already has a comprehensive scheme, of its own enactment, in the trading post area of activity. Chapter 9 of title 5 of the Navajo Tribal Code consists of leasing regulations with respect to traders and trading posts, and chapter 3 of title 13 includes detailed provisions for sanitary permits and sanitary regulation of trading posts.

Because of the great distances involved and the difficulty and expense of transportation to outside markets, the trading posts are vital points of contact, communication, and trade in basic commodities and staple foods. Trading posts have historically been a vital part of Navajo life and economy. Imposition of a privilege tax by the states would constitute an overburden on the rentals charged traders on the Navajo

Reservation, which are based on a percentage of gross sales at each trading post.[8] The added burden could and would weaken and demoralize, if not actually destroy, the Navajo Tribe's own freedom to collect rentals and to regulate trading practices for the general benefit and protection of its people.

CONCLUSION

Because (1) the imposition of a state privilege tax on Indian commerce is violative of the commerce clause of the Constitution, (2) Indian commerce is closed to state regulation by reason of the preemption by Congress of the field through the enactment of a comprehensive system of federal law, and (3) for the additional reasons heretofore set forth in this brief of *amicus curiae*, the decision of the Supreme Court of Arizona should be reversed.

Respectfully submitted.

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December 1964

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[8] Section 747 of title 5 of the Navajo Tribal Code provides that "the lessee [Indian trader] shall pay *rent* at the rate of *one and one-half per cent of the gross receipts* from all wholesale and all retail transactions on or arising from the business conducted on the leased premises; provided, however, that the minimum annual rental for each trading post shall be $300 * * *." (Italics added.)

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No. 115

In The Supreme Court Of The United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, a corporation,
Appellant,

vs.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE APPELLEES

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No. 115

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

BRIEF FOR THE APPELLEES

INTRODUCTION

The appellees, The Arizona State Tax Commission and Thad M. Moore, Warren Peterson and W. E. Stanford, do not take issue with the preliminary matters raised by appellant. This brief will be therefore confined to the argument raised by the appellant.

ARGUMENT

INTRODUCTION

It is the position of the appellees that the State of Arizona may impose the tax at issue upon Indian traders doing business in the State of Arizona on Indian Reservations within the State. The appellees believe that the tax in question is not a licensing or regulatory statute within any stretch of the imagination; that consequently the State of Arizona is not attempting to regulate Indian traders in contravention of any federal statute or regulation or overriding federal policy. The United States Government in effectuating Article 1, Section 8, Clause 3 of the United States Constitution insofar as Indian Tribes are concerned has not attempted to regulate or say anything whatsoever concerning taxes on Indian traders and therefore has not fully occupied the field. The tax in question in no possible way could be considered an interference with or a burden on, the right of any of the tribes to practice their right of tribal self-government. Further, it is the position of appellees that not only has there been no Congressional interference, but there has been in effect Congressional approval spelled out in 4 U.S.C. 101-111, commonly known and cited herein as the Buck Act. We believe that the language of that law makes it clear that Congress has made taxation imposed on non-Indian persons doing business on the reservation, a matter for state determination.

THE HISTORY IN OTHER STATES OR IN ARIZONA IS IMMATERIAL

It is submitted that the history of prior taxation, or lack of it by states other than Arizona is totally immaterial to a decision in this case. Of necessity it is often a long process before tax administrators or taxpayers decide that the facts or the economics

justify the creation of litigation. If one attempts to explain any delay in the attempt by the State of Arizona, or any other state to collect the taxes it feels due to it, one immediately enters the area of human nature, the enterprise of tax administrators, the favorable or unfavorable personal income tax structures of the taxpayers, the budget problems of both taxpayer and tax administrator, the skill of auditors and perhaps last, but seldom least, politics. The issue or issues which appellant attempts to insert into the case by reason of the history of different taxes in different states or even the history of this tax in Arizona is simply not justicable.

ARTICLE 1, SECTION 8, CLAUSE 3 OF THE CONSTITUTION OF THE UNITED STATES DOES NOT BY EXPRESS LANGUAGE OR BY IMPLICATION PREVENT A STATE FROM IMPOSING A NON-DISCRIMINATORY TAX ON A CORPORATE INDIAN TRADER OF THE TYPE IMPOSED HEREIN

COMMERCE WITH INDIANS AS COMMERCE WITH A TRIBE

A. The appellees do not dispute the broad argument of the appellant to the effect that commerce with an Indian on a reservation constitutes commerce with an Indian Tribe within the meaning of the Constitutional section cited above. That Constitutional clause is a grant of authority to the government of the United States to regulate such commerce and where they have undertaken to regulate it, there is no question concerning their authority to do so. It is submitted, however, that unless and until Congress has actually regulated, by specific statutory enactment, or unless there is interference with tribal self-government or an actual burden on commerce or an interference with it, the state may tax a trader as it taxes all other businesses in the state.

THE FACT THAT THE ARIZONA TAX HAS BEEN DENOMINATED AS A PRIVILEGE TAX IS IMMATERIAL

B. The appellees agree that the statute is self-described as a privilege tax. They also agree that the Supreme Court of the State of Arizona has often characterized it as a privilege tax. But it is a fact that the principal reason for this characterization and the language of the statute is to make crystal clear the fact that it is a tax imposed on the person doing business as opposed to a tax on a person buying retail goods. In other words, the court has gone to great pains to differentiate this type of tax from the sales tax in which the imposition of tax is on the purchaser at retail. For the clearest analysis of this see, *Arizona State Tax Commission v. Garrett Corporation,* 79 Ariz. 389, 291 P.2d 208 (1955).

It is also true that despite this characterization the Supreme Court of the State of Arizona has also stated that it is a tax upon the "privilege or *right* of doing business." (Emphasis supplied). *Arizona State Tax Commission v. Garrett Corporation, supra; Industrial Uranium Co. v. State Tax Commission,* 95 Ariz. 130, 387 P.2d 1013 (1963).

If doing business in Arizona is a "privilege" it is hardly a very valuable one. Any person may have a lifetime right to do business in the State of Arizona for the payment of a fee of $1.00. A.R.S. § 42-1308.A. It would seem just as logical to characterize a state income tax as a tax upon the privilege of receiving an income, and an ad valorem tax upon the privilege of owning a home or other property.

The appellees do not find a Constitutional demand that the tail wag the dog.

THE PROTECTION OF INTERSTATE COMMERCE AND FOREIGN COMMERCE RESTS ON A DIFFERENT BASIS THAN THE PROTECTION OF COMMERCE OF INDIAN TRIBES

C. In the first place this Court has made it abundantly clear that the prohibition against any state taxing imports or exports depends for its validity not upon a constitution of the Commerce Clause, Article 1, Section 8, Clause 3, but upon the clear and undeniable prohibition contained in Article 1, Section 10, Clause 2, generally called the Import-Export Clause which clearly states: "No state shall . . . lay any imposts or duties on imports or exports . . ." The decision by Justice Douglas in *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, distinguishes the Commerce Clause in its application to exports and its application to interstate commerce.

> "The two constitutional provisions, while related, are not coterminus. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. Brown v. Maryland, 12 Wheat (U.S.) 419; Crew Levick Co. v. Pennsylvania, 245 U.S. 292. But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether or not the article was or had ever been, an import or export (citations omitted). Moreover, the Commerce Clause is cast; *not in terms of a prohibition against taxes*, but in terms of a power on the part of Congress to regulate commerce. It is well established that the Commerce Clause is a limitation upon the power of the state, even in the absence of action by Congress. (citations omitted). But the scope of the limitation has been determined by the Court in an effort to maintain an area of trade free from state interference and at the same time to make interstate commerce pay its way. As recently stated in McGoldrick v. Berwind-

White Coal Mining Co., supra (309 U.S. p. 48), the law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile a competing constitutional demand, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed'." (Emphasis supplied).

The State of Utah was recently faced with the problem arising from an exploration into interstate commerce. In *Pacific States Cast Iron Co. v. State Tax Commission,* 13 Utah 2d 113, 369 P.2d 123 (1962), the question before the court involved the shipment of pipe out of the state immediately following the sale. The majority of the court attempted to read into this problem the language of this Court in *Richfield, supra,* and held that the language of *Richfield* prevented the imposition of any state sales tax. Two judges dissented pointing out with some emphasis the fact that *Richfield,* by its own language, confined itself to imports and exports, citing in part the portion of the decision quoted above. This Court reversed, in effect upholding the position of the dissenting judges and reversed on the authority of one case, *International Harvester v. Department of the Treasury,* 332 U.S. 340. The per curiam decision of this Court is found at 372 U.S. 605. It would appear that the pertinent portions of the *Richfield* decision, *supra,* is to the effect that there is a difference between regulation and taxation. The Court simply stated that where the Constitution prohibits taxation that is, "imposts or duties" the language speaks for itself and nothing more is to be said. But when it speaks of granting Congress the power to regulate, this is not an automatic barrier to state taxation unless it can be shown that the taxation itself by reason of discrimination or other factors contained in the taxing statute actually constitutes a burden on Interstate Commerce. In short the Court has stated that insofar as the Commerce Clause is concerned, the norm that it will consider is the norm of "consituting a burden". It would also consider that norm even in export-import cases if it were not for the flat prohibition against

such taxation contained in another section of the Constitution. This is solid statutory interpretation. When the founding fathers went to the specific area of prohibiting taxation on the part of the states in the field of foreign commerce their meaning is clear. When they did not prohibit taxation in the Commerce Clause, we can only find a prohibition when the taxation itself, by its very nature, interferes with the right of Congress to regulate commerce or when interstate commerce is actually impeded by the taxation imposed by the states. Commerce among the several states is commerce between two geographically separate sovereign jurisdictions, while commerce with the Indian tribes takes place wholly within one sovereign jurisdiction. One is interstate while the other is intrastate where the jurisdictions are concurrent.*

The appellees agree wholeheatedly with the language of Chief Justice Marshall cited in the appellant's brief on page 19. We agree that efforts on the part of states to attempt to interfere with the free flow of commerce would be disastrous to the nation as a whole and would be totally inconsistent with the idea of the federal government even if it were not specifically prohibited by the Constitution. But we also insist; and have to support our insistence citations by this Court too numerous to list, that interstate commerce must pay and can be required to pay its fair share to the states in which a person conducting such business does business. The appellants would, I am sure, admit these general principles of law as they are too well established to be refuted. What they are in essence saying is that because this particular tax is denominated as a privilege tax, that per se it must be either a burden on interstate commerce or an interference with it. This Court has not always so held. While general language to that effect appears in *Spector Motor Service v. O'Connor,* 340 U.S. 602, it would appear on analysis that the language contained therein is too broad to fit the facts of the case and that the dissenting opinion contains a far more logical and convincing analysis of the problem.

This Court in fact has upheld state taxes against a claim of

conflict with the Commerce Clause even where the state taxes in question have been privilege taxes. For example, we have *International Harvester v. Department of the Treasury*, 322 U.S. 340, which held that even though there were incidental interstate attributes to a state transaction the state tax could be properly levied. And the tax in question had been specifically described by this Court as a privilege tax in *J. D. Adams Manufacturing v. Storen*, 304 U.S. 307. *International Harvester, supra*, was dealing with Indiana taxes. However, in 1951, in *Norton Co. v. Department of Revenue*, 340 U.S. 534, an Illinois tax upon certain transactions formed part of an interstate transaction was upheld by this Court and the Illinois tax in qeustion had been specifically described by the Illinois Supreme Court as "A tax not on property, but upon the privilege of engaging in the business of selling . . .". *Novicki v. Department of Finance*, 373 Ill. 342, 26 N.E.2d 130 (1940).

As noted above the *International Harvester* decision was specifically reaffirmed in the past term by this Court in a totally interstate transaction in *Pacific Cast Iron Pipe Co. v. State Tax Commission*, 372 U.S. 605. In short, this Court has upheld taxes even though they have been denominated privelege taxes in the field of interstate commerce if it has found that the taxes are not unduly burdensome, and if it has found that the tax is not discriminatory, i.e. picking out a foreign corporation and taxing it at a higher level than a local business, *e.g. Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389.

NO FEDERAL POLICY OR FEDERAL STATUTE OR RULE OR REGULATION IS AFFECTED BY THE TAX

We agree that the subject of commerce with the Indian tribes is subject to the regulation of the Congress. We agree that if Congress wished it could prohibit the tax in issue. We also agree that even if it did not state such a prohibition specifically, if from the facts it were found that the imposition of such a tax actually

did interfere with the regulatory power of the United States Government that such a tax would have to fall. But plainly and simply there is nothing in the statutes of the United States or in the rules and regulations of the Department of Interior which would imply that a state may not levy a simple tax upon the right of a person to do business within the state. As pointed out above, all the State of Arizona requires is that a person show up with a dollar in hand, and thereafter has a perpetual license to do business anywhere in the state. There is no regulatory aspect whatsoever to the tax and to attempt to insert it is to fly in the face of both the statutes, reality and common sense. Appellant on page 21, lists some speculative dangers in allowing such a tax. Whatever fanciful thing might happen in the future or whatever another state may or may not do, is totally immaterial. There is no prohibition of the sale of any commodity. There is no showing of high moral character or any character indeed. There is no forbidding of any commerce whatsoever. It would be seriously doubtful if the State of Arizona could in fact enact prohibitions of the type suggested by the appellant absent a clear police-power showing. And this Court has recently stated that in a case involving clear and undisputed interstate commerce a reasonable state police power regulation will be upheld even though it does actually interfere with the commerce. *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440. This distinction between taxation and regulation is clear and logical on its face and has been supported by this Court in a similar and convincing line of cases. A state may not impose its contractor licensing requirements on an out-of-state contractor working on a federal project. *Miller v. Arkansas,* 352 U.S. 187. This clearly would be an interference with the federal government's right to do business as it pleases and is in conflict with the federal policy to award federal projects to the lowest responsible bidder. The sovereignty of the United States must remain intact. The states recognize it and the decision specifically reaffirms it. On the other hand, however, this Court has consistently and clearly upheld the right of states to impose taxes on contrac-

tors doing business with the United States Government. *James v. Dravo Contracting Co.*, 302 U.S. 134, *Graves v. New York*, 306 U.S. 466; *Alabama v. King and Boozer*, 314 U.S. 1; *United States v. City of Detroit*, 355 U.S. 466; *Curry v. United States*, 314 U.S. 14; *Esso Standard Oil Co. v. Evans*, 345 U.S. 495; culminating most recently in *United States v. Boyd*, 378 U.S. 39. And these cases in recent years have been consistent despite the fact it has been shown, argued or admitted that the ultimate economic burden of such taxes may, by contract, have to be borne by the United States Government. The appellant herein reiterates and argues again and again that our statute is a licensing statute. But the tax conidered in *Dravo, supra*, at U.S. 138 was equally as much an annual privilege tax. The licensing provisions of our statute are simply a device to inform the State Tax Commission who is engaged in business and where they are doing business, so that the monthly returns may be provided. To call it regulation is to indulge in complete fancy. Regulation which is to be condemned is that which is noted in the *Miller v. Arkansas* case, *supra*, and not a regulation which states that anyone may have a license by merely asking for it and paying a fee so low as to bring it within the doctrine of de minimis non curat lex.

THE STATE HAS NOT ATTEMPTED TO REGULATE INDIAN COMMERCE, CONGRESS HAS NOT OCCUPIED THE FIELD WHICH THE STATE SEEKS TO ENTER

A. We are not in accord with the appellant's position that the United States has completely or thoroughly regulated or occupied the field of regulation of Indian tribes. For example the law merely states that prices must be reasonable, 25 U.S.C. 261. There has been no attempt to enter the field of price structure, profit or loss, return on original investment or any such matters indicating a desire to occupy the field in the way in which public utilities are regulated. Part of the history of Indian affairs is reported in *Organized Village of Kake v. Egan*, 369 U.S. 60, and the Congres-

sional record shows clearly that the amount of regulation has been steadily diminished through the years. Any regulation goes only so far as Congress has deemed necessary and it has not gone far. But whether it has or not it is the appellee's position that the tax imposed by the laws of the State of Arizona in issue before this Court is not a regulation of any commerce whatsoever. In interstate commerce both the "purchasing and selling" are regulated. Formerly Congress regulated some purchases from Indians, as shown below. But now purchases from Indians are entirely unregulated. Congress has only vested the Department of Interior with regulating sales to Indians. 25 U.S.C. 261.*

We are not saying that taxes are necessarily and always free from attack on the grounds that they do in effect regulate commerce either with Indian tribes or interstate commerce or any thing else. What the appellees do hold is that the fact that the tax is not in and of itself per se regulation. In times past there was authority to the effect that all taxes are regulations of some sort or another. On the basis of that theory it was held that states could not impose an income tax on the income of federal employees, and that similarly the federal government could not impose an income tax on employees of state government. This doctrine has since with met the fate it deserved, complete refuation. *Graves v. New York*, 306 U.S. 466. Similarly as we have pointed out above, the concept that the tax on a person doing business with the government constituted an interference with or a regulation of the right of the government to conduct its own affairs has since gone by the boards. Further, even older concepts that any tax which affected interstate commerce at all must fail has been replaced by a more reasonable and enlightened attitude. A tax even if it does affect interstate commerce can be valid if it does not constitute an undue burden on that commerce or if it does not constitute discrimination against that commerce. *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33.

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*Navajo Tribal Code Title 5, Sec. 746(7).

The appellant herein has not claimed that there is an undue burden by virtue of the amount of the tax; he has not claimed that there is discrimination for the fact is that there is none. The appellant is just in the same situation as any other corporate entity in the State of Arizona doing a retail business.

Unfortunately the guidelines which have been laid down for a determination of what burden on interstate commerce is "undue" or not is of little assistance here. For, by its very nature, interstate commerce requires two states and a transaction or way of doing business that has aspects in two different territorial jurisdictions. For instance, this Court has held that a way of doing business which involves only bare solicitation from one state with the order placing, the credit applications, and the manufacturing taking place in another state has been insufficient to provide a taxable basis in the state in which the solicitation took place. Similarly questions of mutliple taxation have given rise to the consideration of the Court, *General Motors Corp. v. Washington,* 377 U.S. 436. But in essence the claim of the appellant does not rest upon a belief or a statement or an assignment that the burden placed upon it is an undue burden within the meaning of any of the commerce clause cases. It has simply claimed that the clause itself protects it regardless of whether or not it is an actual burden.

THERE IS NO INTERFERENCE WITH THE INDIAN TRIBES OR THEIR RIGHT OF SELF-GOVERNMENT

As the decision of the Arizona Supreme Court points out the tax is not levied against the Indians, but only against those who are engaged in the business of selling within the geographical boundaries of the State of Arizona. The applicability of a state law depends upon whether or not the state action has infringed in any way on the right of reservation Indians to make their own laws and to be ruled by them. *Williams v. Lee,* 358 U.S. 217; *Organized Village of Kake v. Egan,* 369 U.S. 60. The appellant has

pointed out, and it is reiterated in a number of the amici briefs that one of the tribes in the State of Arizona has decided to go into the tax business for itself. The state admires their initiative, but is totally unconcerned with it. The assertion is made that because one tribe has enacted a tax similar to a state tax, that somehow or another this means that the state has interferred with the right of tribal self-government, or discouraged trade with the Indians. The appellees can find no authority for this proposition and none has been cited. It would appear to have about as much logical weight as stating that a state cannot levy a tax on the income of persons because the federal government has drafted an income tax act. Similarly the federal government has enacted a limited area excise tax on the sales of certain items designated as luxuries. Does this preclude the state from enacting a sales tax or a luxury tax of its own? No case has ever held this to be true and no argument has ever seriously been raised to that effect. Multiple taxation may be unfortunate, but it is a fact of life with which all of us live. The average person in the average state pays more taxes than he himself can probably guess or recall. They include state income tax, federal income tax, state property tax, city property tax, county property tax, common school district tax, high school district taxes, junior college taxes, special assessment and improvement tax, irrigation district tax, state sales tax, city sales tax, federal excise tax, unemployment security tax, and old age survivor's and insurance tax. And this horrifying list only applies to the average working man and does not include the multiplicity of taxes that a business man may have to pay by virtue of his business.

In total refutation of this argument this Court has consistently upheld the ability of the state to levy taxes even directly on Indians. *Leahy v. State Treasurer of Oklahoma,* 297 U.S. 420 (Income taxes) and (Inheritance taxes); *Oklahoma Tax Commission v. United States,* 319 U.S. 598.

THE TAX EXEMPTION HEREIN SOUGHT MUST BE CLEARLY EXPRESSED AND NONE CAN BE IMPLIED FROM THE LANGUAGE OF THE CONSTITUTION

Basically appellant's argument is founded on the premise that since Arizona has a privilege tax and this Court has said that a state may not "tax the privilege of engaging in" interstate commerce it therefore cannot tax the privilege of engaging in Indian commerce. This position, tenable as it might appear on first blush, is directly in conflict with the prior holdings of this Court in interpreting the relationship of the United States to its Indian tribes. The only mention of Indian tribes or Indians in the Constitution of the United States (exclusive of the enumeration provisions relative to membership in Congress) is found in Article 1, Section 8, Clause 3. This Court has clearly and consistently and uniformly held in the last one hundred years that the states have all the jurisdiction they could possibly have over Indian land and reservations and the people on them unless the exercise of such jurisdiction would interfere with a federal statute. To be precise:

> "Enactments of the federal government passed to protect and guide its Indian wards only affect the operation, within the colony (or reservation) of such state laws as conflict with the federal enactments. *United States v. McGowan,* 302 U.S. 535."

See also:

> "A typical illustration is found in the usual Indian reservation set apart within a state as a place where the United States may care for its Indian wards and to lead them into habits and ways of civilized life. Such reservations are part of the state within which they lie, and her laws, civil and criminal have the same force therein as elsewhere within her limits save that they can have only restricted applications to the Indian wards."

See also, *Thomas v. Gay*, 169 U.S. 264 in which a tax on the cattle of non-Indian lessees' reservation lands was upheld, even though the tax might have an indirect effect on the Indians. See also, *Williams v. Lee*, 358 U.S. 217 in which this Court held that the applicability of a state law depends on "whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." And again in *New York ex rel Ray v. Martin*, 326 U.S. 496, "In the absence of a limiting treaty obligation or a Congressional enactment each state had a right to exercise jurisdiction over Indian reservations within its boundaries." And finally, the most recent case, *Organized Village of Kake v. Egan*, 369 U.S. 60, which held that state game and fish laws were applicable to the Indians and reiterated the concept that even where the Department of Interior had attempted to regulate and authorize the use of fish traps by Indians, it could not do so in the absence of a clear Congressional directive and that in the absence of such Congressional enactment state law was prevailing. The *Kake* case, *supra*, again reiterated the concept that unless Congressional enactment blocks states' actions, the states are free to effectuate and enforce their normal laws on Indian reservations dealing even directly with the Indians themselves. In still another case, *British American Oil Producing Co. v. Board of Equalization of Montana*, 299 U.S. 159, this Court had an opportunity to consider the question of a tax imposed by an oil miner on leased Indian lands. The tax was levied upon the gross production of the gas and oil. This, like the situation in the *Gay* case was certainly commerce with the Indian tribes. This Court has specifically held that such a tax was valid.

CONGRESS HAS PROVIDED IN THE BUCK ACT THAT STATE GROSS RECEIPTS TAX MAY BE IMPOSED UPON AN INDIAN TRADER MAKING SALES TO INDIANS WITHIN AN INDIAN RESERVATION

On October 9, 1940, the Congress passed the Buck Act which specifically provided that no person should be relieved from the payment of a "sales or use tax" or from the payment of an "income tax" levied by any duly constituted taxing authority by reason of the fact that the sales, use or transaction giving rise to the income occurred in whole within a federal area. October 9, 1940, 54 Stat. 1059, 4 U.S.C. 105 and 106.

The term "sale or use tax" means any tax measured by "receipts from sales" and the term "income tax" means any tax measured by "gross receipts", Oct. 9, 1940, 54 Stat. 10, 4 U.S.C. 110 (b) and (c).

The term "Federal area" means any lands or premises held or acquired by the United States or any department, estates grant or agency of the United States and also any lands or premises held or acquired for the use of the United States or any department, establishment or agency of the United States. Oct. 9, 1940, 54 Stat. 1059, 4 U.S.C. 110 (e).

The Buck Act was introduced in the House by Congressman Buck as H.R. 6687.

"The purpose of H.R. 6687 is to provide for uniformity in the administration of State sales and use taxes within as well as without Federal areas. It proposes to authorize the levy of State taxes with respect to or measured by sales or purchases of tangible personal property on Federal areas. The taxes would in the vast majority of cases be paid to the State by sellers whose places of business are located off the Federal areas and who make sales of property to be delivered in such areas." House

Report No. 1267, 76th Congress, 1st Session, Vol. 10301—accompanying H.R. 6687.

"This bill passed the House at the first session of the Seventy-sixth Congress and was referred to the Committee on Finance which reported it to the Senate with certain clarifying changes on July 28, 1939. Due to certain objections being raised to the bill by various departments in the executive branch of the Government after the bill had been reported to the Senate, it was recommitted to the Committee on Finance for further study and recommendation. This committee, through a subcommittee composed of Senators George, Brown and LaFollette, held a hearing on April 23, 1940, at which time representatives of the various State taxing authorities appeared in favor of the bill and representatives of the War and Navy Departments and of the Department of the Interior appeared in opposition to certain features of the bill.

Upon completion of the hearings, the subcommittee suggested that a conference be held by the representatives of the state agencies and the Federal agencies with a view to recommending to said subcommittee any proposal or proposals upon which said representatives could agree. Such a conference was held and the proposals which were submitted were used as a point of departure by the subcommittee in drafting the amendment reported by your committee." Senate Report No. 1692, 76th Congress 3rd Session, Vol. 10429—accompanying H.R. 6687.

At the hearing before the subcommittee on April 23, 1940, the problems of taxation on Indian Reservations posed by H.R. 6687 were considered. Senator M. LaFollette proposed an amendment exempting Indian Reservations from provisions of the Bill. (Hearing before a Subcommittee of the Committee on Finance of the United States Senate, Seventy-Sixth Congress, Third Session on H.R. 6687, pages 2 and 6). The assistant solicitor of the Department of Interior testified in favor of the LaFollette amendment. (Hearing before a Subcommittee of the Committee on Finance of

the United States Senate, Seventy-Sixth Congress, Third Session on H.R. 6687, page 37). He introduced a letter from the Acting Secretary of the Interior to the Chairman of the Committee on Finance of the United States Senate recommending a proviso that stated the Act "shall not affect existing law relating to taxation of Indian reservations." (Hearing before a Subcommittee of the Committee of Finance of the United States Senate, Seventy-sixth Congress, Third Session on H.R. 6687, page 39).

The LaFollette Amendment was opposed by Governor Miles of New Mexico. (Hearing before a Subcommittee of the Committee of Finance of the United States Senate, Seventy-sixth Congress, Third Session on H.R. 6687, pages 2 and 18).

As a result of the subcommittee hearing on April 23, 1940, and a further conference between state officials and officials of the United States including the Department of the Interior neither the LaFollette Amendment nor the proviso recommended by the Acting Secretary of the Interior were adopted. Instead the following proviso was adopted:

> "Nothing in sections 103 and 106 of the title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." Oct. 9, 1940, 54 Stat. 1059, 4 U.S.C. 109.

The phrase "Indians not taxed" is found in the XIV Amendment of the United States Constitution. On November 28, 1940, some two months after the Buck Act was passed, the Attorney General, then Robert H. Jackson, stated that it is very doubtful that there are "Indians not taxed" because all Indians are subject to the Federal Income Tax Law. 39 Op. Atty. Gen. 518. Consequently Section 109 would not operate to relieve any Indian from tax liability even if the Court were disposed to interpret the tax in question as a tax upon Indians.

At any rate Section 109 and the testimony of various individuals before the Subcommittee of the Committee on Finance of

the United States Senate conclusively show that Congress intended the term "Federal area" to include Indian Reservations.

Therefore since transactions and sales of personal property to Indians off the reservation would be subject to tax, transactions and sales of personal property to Indians on the reservation are subject to tax.

CONCLUSION

Whatever might be said of the history of the Commerce Clause and whatever the decisions of this Court might be in determining what does or does not constitute an unconstitutional burden on Interstate Commerce by way of state taxation (however such tax may be denominated), it is clear that in dealing with the clause as it affects Indian tribes, this Court has been consistent and clear. It has stated time and time again that a state may act where the federal government has chosen not to act and where the state's act will not necessarily interfere with tribal self-government. This has been true even when economic agreements with the Indians or the tribes or the individuals have been concerned. This has been true even where the Department of the Interior has attempted to act by rule and regulation but has failed to show clear, statutory, Congressional authorization to do so. And while it is true that this precise issue has never been before the Court, the history and tenor of the cases in the Indian field, the cases dealing with federal contractors, and even the cases dealing with interstate commerce have all shown that a state has the right and the power to tax those persons doing business in its borders, unless it is directly contrary to a federal enactment or necessarily a burden. Insofar as Indian tribes are concerned the only burden that has been sustained by the Court is one which interferes or burdens the right of the Indian tribes to their tribal self-government. Since there is no federal statute or not even a federal policy prohibiting or implying that a state may not tax businessmen who happen to be Indian traders (indeed the implications are clearly to the con-

trary) and since there is no burden or barrier to tribal self-government, it is clear that the tax levied herein is proper and that the decision of the Supreme Court of the State of Arizona is correct in law and should be affirmed.

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No. 115

In The
Supreme Court of the United States

OCTOBER TERM, 1964

WARREN TRADING POST COMPANY, a corporation,
Appellant,

v.

THE ARIZONA STATE TAX COMMISSION and THAD M. MOORE, WARREN PETERSON and W. E. STANFORD as members of The Arizona State Tax Commission,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S REPLY BRIEF,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARIZONA

APPELLANT'S REPLY BRIEF

ARGUMENT

In their Brief to this Court, appellees contend for the first time —and apparently as an afterthought—that the legislative history of the Buck Act[1] indicates a Congressional intent to authorize the imposition of state privilege taxes upon sales made by Indian Traders on reservations to reservation Indians. Brief for the Appellees, pp. 16-19. This Reply Brief is directed only to appellees' new argument.

[1] 54 Stat. 1059, October 9, 1940; Recompilation July 30, 1947 (see House Report No. 252, 80th Congress, 1st Session), 61 Stat. 641 (1947), 68 Stat. 1227 (1954), 4 U.S.C. §§ 105-110.

Appellant's answer to this argument is threefold:

1. The Buck Act's definition of "Federal area" (the ambit of the Act) does not include Indian reservations. Being a clear and unambiguous statutory definition, it is controlling and forecloses a consideration of legislative intent.

2. In any event, the legislative history demonstrates that the Buck Act was not intended to change the existing state sales tax picture on the reservations. Instead, the reference to Indians in the Buck Act was included to prevent the misconception that either of two possible changes was intended: (i) that the Act gives tax shelter to sales made by Indian Traders to non-Indians on the reservation (it does not), or (ii) that the Act permits a tax upon sales made to Indians on the reservation (it does not).

3. An early Interior Department interpretation of the Buck Act, acquiesced in by the states over a long period of time, constitutes persuasive evidence that the Act was not intended to permit state taxation of reservation sales to Indians.

Considering first its scope, Sections 105 and 106 of the Buck Act confine its application to Federal areas, and Section 110(e) thereof defines the phrase "Federal area" in pertinent part as follows:

> "The term 'Federal area' means any lands or premises held or acquired by or for the use of the United States or any department, establishment, or agency of the United States; . . ."

Are Indian reservations "lands . . . held or acquired by . . . the United States" within the language and purpose of this definition? In some contexts, Indian reservation lands are considered to be held in trust by the United States. However, in other contexts, the

lands are considered as being held or owned by the tribes themselves.[2]

Are they held "for the use of the states or any department, establishment, or agency of the United States . . ."? Here the answer is clearly "no". Reservation lands are held wholly and solely for the use and benefit of the Indians. *Federal Indian Law*, United States Dept. of Interior (1958), p. 590; 1 *Navajo Tribal Code*, pp. xi, xvi and § 746 (5), p. 285; *Healing v. Jones*, 210 F. Supp. 125, 180 (D. C. Ariz. 1962); *In re Forty-Three Cases Cognac Brandy*, 14 Fed. 539 (CC Minn. 1882). Had Congress intended the "Federal area" definition to include Indian reservations, it would have been a simple enough matter to have so written it. As the definition stands, however, Indian reservations are not within the perimeters of its language.

Unambiguous statutes are not properly subject to the process of statutory interpretation. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). And statutory definitions are the controlling guide to ascertaining Congressional intent and prevail over extrinsic aids. *Von Weise v. Commissioner of Internal Revenue*, 69 F.2d 439, 441 (8th Cir.), *cert. denied* 292 U.S. 655 (1934); 2 Sutherland, *Statutory Construction*, §§ 3002 and 4502. Thus, since the language of the Buck Act is unambiguous, and since it includes a clear statutory definition of the term "Federal area" worded so as to exclude Indian reservations, it is inappropriate to consider the Act's legislative history in this regard.

To appellant's knowledge, the only court that has been confronted with the question of whether the phrase "Federal area" includes an Indian reservation has adopted the same view as hereinbefore set forth. In *Your Food Stores, Inc. v. Village of Espan-*

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[2]For a detailed discussion of the situations in which reservation lands are considered to be held or owned by the tribes themselves and of the other situations where these lands are considered to be held in trust for the tribes by the United States, see *Federal Indian Law*. United States Dept. of Interior (1958), pp. 583-745.

ola, 68 N.M. 327, 334; 361 P.2d 950, 955-956 (1961), the New Mexico Supreme Court said:

> "By the statutory definition of 'Federal area' it is obvious this statute does not give the states permission to levy a sales tax upon Indian lands. These lands are not lands or premises held or acquired for use of the United States or any department, establishment, or agency of the United States. . . ."

But assume that, despite the unambiguous language of the statutory definition, an inspection of the legislative history is still appropriate. Appellant submits this history strongly supports its position.

The principal operative sections of the Buck Act (§§ 105, 106) authorize the states to impose sales and use taxes in a Federal area "to the same extent and with the same effect as though such area was not a Federal area".

The Legislative Reports show that the main purpose of the Act was to forestall the claim by merchants that sales or delivery of goods within military reservations and national parks were exempt from state sales taxes.[3]

And, as set forth in the "Detailed Explanation of the Bill" contained in the Senate Finance Committee's Report thereof[4], Section 105 of the Act "will not affect any right to claim any exemption . . . on any ground other than that the Federal Government has exclusive jurisdiction over the area where the transaction occurred." Likewise, Section 106 will remove the exemption "where the exemption is based solely on the ground that the taxpayer resides within a Federal area or receives his income from transactions occurring or services performed in such area."

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[3] (See House Report No. 1267, July 22, 1939, 76th Congress, 1st Session, Vol. 10301; Senate Report No. 1028, July 28, 1939, 76th Congress, 1st Session; Hearing before a Subcommittee on Finance of the United States Senate, Seventy-Sixth Congress, Third Session, April 23, 1940, on H.R. 6687, hereinafter called the "Subcommittee Hearing.")

[4] Senate Report No. 1625, 76th Congress, 3rd Session, May 16, 1940, Vol. 10429, pp. 2, 3 thereof.

Thus, the Buck Act was intended to remove only the barrier to state taxation presented by lack of state jurisdiction over Federal areas, such as military bases and national parks. It was not intended to remove any other barriers, such as the one that exists regarding Indian commerce by virtue of the Commerce Clause of the United States Constitution.

Section 109 of the Act provides:

> "Nothing in Sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed."

How and why did Section 109 come into being? What does it mean and what is it intended to do?

Significantly, H. R. 6687 passed the House of Representatives (on July 26, 1939) without any language equivalent to Section 109 or any other mention of Indians or Indian reservations. It then was duly referred to the Subcommittee of the Senate Committee on Finance. At this point, the Department of the Interior became interested in the bill, and the problems concerning Indians and Indian reservations were first discussed.

It is important to understand that the existing law prior to the passage of the Buck Act permitted taxation of reservation sales to non-Indians, but prohibited taxation of reservation sales to Indians. 57 I.D. 124; *Neah Bay Fish Co. v. Krummel,* 101 P.2d 600 (Wash. 1940). At page 38 of the Subcommittee Hearing, Mr. David Speck, Assistant Solicitor of the Department of the Interior, so summarized it. In one respect, however, the law was not uniformly honored. Some merchants were attempting (improperly) to claim sales tax shelter for on-reservation sales to non-Indians. Subcommittee Hearing, pp. 2, 18-20.

On August 1, 1939, the Acting Secretary of the Interior, Mr. E. K. Burlew, wrote a letter to the Hon. Pat Harrison, Chairman of the Committee on Finance, which is printed in full on pages 38-9 of the Subcommittee Hearing. Despite assurances by the

Office of the Senate Legislative Counsel that the Act was not intended to apply to transactions within Indian reservations, the Acting Secretary in his letter expressed the fear that the Buck Act might be misconstrued by the States to authorize the imposition of taxes upon reservation sales to Indians. He concluded his letter by recommending an amendment to prevent such misconstruction, as follows:

> "Provided, that this Act shall not affect existing law relating to taxation on Indian reservations."

On August 3, 1939, two days after the proposed Burlew amendment, Senator Robert M. La Follette proposed an amendment also designed to maintain the status quo with respect to states' rights to tax on Indian reservations, as follows:

> "Provided that the provisions of this Act shall not be applicable with respect to any transaction occurring in whole or in part within an Indian reservation."[5]

Representatives of California and New Mexico feared the La Follette amendment would be misconstrued so as to destroy the status quo in the opposite direction, i.e. by exempting from taxation reservation sales to non-Indians. Subcommittee Hearing, pp. 2, 18, 19, 20. To prevent this danger, Mr. Dixwell L. Pierce, Executive Secretary of the State Board of Equalization of California, proposed the following pertinent language (Subcommittee Hearing, p. 5):

> "but nothing contained herein shall be construed . . . as affecting any existing law with respect to the taxation of Indians."

Senate Report No. 1625[6], which accompanied the final version of the bill (including the now Section 109) to the Senate, gives no explanation for the failure to follow precisely either the language suggested by Acting Secretary Burlew, that recommended by Senator La Follette, or the proposal of Mr. Dixwell Pierce.

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[5]See Congressional Record for August 3, 1939, page 10907 re discussion of H. R. 6687.

[6]76th Congress, 3rd Session, May 16, 1940, Vol. 10429

But speculation as to the thinking behind the compromise language finally adopted seems in order.

First, the most significant fact is that any Indian amendment was adopted. It appears strongly to indicate the intention to achieve the goal first requested by the Department of the Interior but later sought by all who testified on Indians, i.e. preserve the status quo with respect to state sales taxes on the Indian reservations and forestall the chance of misconstructions to the contrary. Subcommittee Hearing, pp. 2, 18, 19, 20, 38, 39.

Next, the use of the word "Indians" in the final version instead of the phrase "Indian reservations" probably was adopted especially to prevent the misconstruction feared by the California and New Mexico representatives; i.e. that sales to non-Indians on the reservation might be held tax exempt. Subcommittee Hearing, pp. 2, 5, 18, 19, 20, 38.

Finally, the addition of the words "not otherwise taxed" appears to be a catchall phrase, added without reported discussion, and apparently was designed to carry forward the same philosophy as applied to fields of taxation other than sales taxes, i.e. preserve the status quo. *Federal Indian Law*, United States Department of Interior (1958), p. 845.

Therefore, it is submitted that the legislative history of Section 109 of the Buck Act supports the view that the Act was not designed to increase, diminish or otherwise change the rights of the states with respect to sales taxes on Indian reservations, but, instead was designed to preserve those rights in the fashion they existed prior to the Act. In other words, Section 109 was designed to permit the continuation of the taxing of on-reservation sales to non-Indians without removing the exemption existing with respect to the on-reservation sales to Indians.

Three years after the passage of the Buck Act, the Assistant Secretary of the Department of Interior rendered a written opinion which interpreted the meaning of the Act with respect to Indians and Indian reservations (58 I.D. 562, 563 (1943)):

"By the act of October 9, 1940 (54 Stat. 1059, 4 U.S.C. Secs. 12-18), Congress permitted the States to extend their sales taxes to persons residing on or carrying on business, or to transactions occurring, in Federal areas. That act, however, contains no indication of any intent on the part of Congress to interfere with the regulation by the Commissioner of Indian Affairs of trade with the Indians on Indian reservations or to burden the Indians with a tax to which they could not then legally be subjected. On the contrary, Section 5 (4 U.S.C. § 109) of the act declares that the permission given to the States shall not 'be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.' While this declaration is somewhat awkwardly phrased the meaning is plain. Basic Indian immunities under the law in force prior to the enactment were not to be disturbed nor were new immunities to be created. The legality of state taxes on sales to Indians thus is to be determined not by but independently of the provisions of the act of October 9, 1940."

From 1943 to 1958, this interpretation stood uncontradicted and unchallenged by the twenty-five states containing Indian reservations. Such official, contemporaneous and practical interpretation of a statute is persuasive as to its meaning. 2 Sutherland, *Statutory Construction* §§ 5104, 5105, 5106. And when such interpretation is acquiesced in for a long period of time, it is considered of great importance in arriving at a proper construction and may well govern such construction. 2 Sutherland, *Statutory Construction* § 5107. As stated by Justice Frankfurter in *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 352 (1941):

"Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. . . ."

CONCLUSION:

For the foregoing reasons, appellant submits that the Buck Act does not expand, diminish or otherwise affect the rights of the states to tax or not tax sales on Indian reservations, and, therefore, the Act is not pertinent to the question before this Court. And for the reasons set forth in Appellant's Opening Brief, it is submitted that Arizona may not license and impose its Transaction Privilege Tax upon an Indian Trader's sales to Indians on an Indian reservation.

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